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In The

Supreme Court of the United States

October Term, 1991

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October 21, 1991

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QUESTION PRESENTED FOR REVIEW

Given the comprehensiveness of the ERISA remedial scheme and the absence of any ERISA policy to be served, may the courts fashion a common-law right of action for contribution and indemnity in ERISA actions for breach of fiduciary duty?

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OPINIONS BELOW

The opinion of the Court of Appeals (reproduced at Appendix A-27 to A-41) (hereinafter "A-"), issued on July 25, 1991, is reported at 939 F.2d 12 (2d Cir. 1991). The opinion of the District Court, issued on December 27, 1990 (A-15 to A-26), is reported at 753 F. Supp. 81 (W.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 25, 1991. A-27. Jurisdiction to review the judgment of the

Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This petition involves various provisions of the Employee Retirement Income Security Act (29 U.S.C. ch. 18), especially 29 U.S.C. § 1103(a), 29 U.S.C. § 1104(a), 29 U.S.C. § 1105, and 29 U.S.C. § 1132. The provisions involved are lengthy, and their pertinent text is set forth in the Appendix (A-2 to A-14).

STATEMENT OF THE CASE

Introduction

This petition presents to the Court an issue that now divides the federal courts. The Second Circuit Court of Appeals has determined to create, for the first time in any jurisdiction, a common-law cause of action entitling a fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") to sue a co-fiduciary for contribution and indemnity. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991) (A-27 to A-41). Other federal courts, including the Ninth Circuit Court of Appeals, have reached a contrary conclusion (see pages 5 to 8 below).

How the case arose

The Fairway Spring Company, Inc. Restated Pension Plan was established by Fairway Spring Co., Inc., a small specialty manufacturing business in upstate New York, to provide retirement income for its employees. Unfortunately, between 1982 and 1984, the trustee of the Plan, one Glen E. Dawson, put its funds into a series of fraudulent investment schemes. As a result, the Plan in-

curred sizeable losses. There is no dispute that the investments were blatantly improper and violated ERISA "prudent man" standards.[1] A-29 to A-30.

In February, 1985, before any losses were realized or suspected, Dawson was succeeded as trustee of the Plan by respondent Sovran Bank/Maryland. A-30. However, Sovran evidently failed to investigate and recognize the impropriety of the investments or their inadequate documentation. Sovran did little if anything during its four-and-one-half-year tenure as trustee to liquidate the improper investments or to seek indemnification from Dawson, thus allowing time limits under Dawson's fidelity bond and liability insurance policies to lapse. The full extent of the irregularities eventually became apparent to Fairway when Sovran wrote off the investments in its 1988 annual report. In August, 1989 Fairway fired Sovran as trustee and hired Chemung Canal Trust Company in its place. A-16, A-30 to A-31.

The new trustee and two plan participants promptly sued Sovran in the United States District Court for the Western District of New York for neglecting its fiduciary duties under ERISA. The Complaint alleged that Sovran failed to investigate the Plan's assets, dispose of its imprudent investments, or bring timely claims against Dawson and the bond and insurance companies from whom claims against Dawson could have been recovered. A-16, 1-30. On behalf of the Plan, Chemung sought damages of $1,507,313.34, plus interest, from Sovran.

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[1] The investments violated ERISA because of their risk and lack of diversification; in addition, Dawson had a personal interest in certain of the principal investments. ERISA section 404(a)(1)(B) (29 U.S.C. § 1104(a)(1)(B)) requires a pension plan fiduciary to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." A-3. The statute also requires that pension plan investments be diversified (29 U.S.C. §1104(a)(1)(C)) and forbids self-dealing transactions (29 U.S.C. § 1106).

Sovran struck back, however, by filing a third-party complaint charging virtually everyone else associated with the Plan with responsibility for the Plan's losses. In addition to Fairway Spring Co., Inc. itself, Sovran sued Fairway's officers and directors, its attorney, and unnamed persons alleged to be members of an investment committee (hereinafter collectively referred to as "Fairway"). Sovran sought indemnity and contribution against Fairway for allegedly failing to discover and correct Dawson's breaches itself and for failing to disclose them to Sovran. Curiously, Sovran also filed a counterclaim for indemnity and contribution against Chemung,[2] which had aggressively instituted legal proceedings to recover the Plan's losses within five months after succeeding Sovran as trustee. A-16, A-30 to A-31.

Decisions of the District Court and Court of Appeals

On a Rule 12(c) motion by Fairway, the district court (Telesca, U.S.D.J.) dismissed the third-party complaint on the ground that ERISA provides no right of contribution or indemnity from co-fiduciaries. A-15 to A-23. The district court then issued an order under FRCP 54(b) authorizing entry of a final judgment as to the third-party claims in order to permit an immediate appeal. A-24 to A-26.

A divided panel of the Second Circuit Court of Appeals reversed. A-27 to A-41. The majority agreed with Fairway that the familiar methodology of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26 (1975), cannot support an implied cause of action for contribution and indemnity under ERISA. A-34. The court decided, however, that a right of contribution should nevertheless be rec-

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[2] ERISA specifically provides that a fiduciary is not liable with respect to any breach of fiduciary duty committed before he became a fiduciary or after he ceased to be a fiduciary. 29 U.S.C. § 1109(b). A-7.

ognized as a matter of "federal common law". A-35 to A-40. Accordingly, the third-party complaint and counterclaim were reinstated.

Judge Altimari dissented from the majority holding, stating that in his view "if Congress had intended to include a right of action for contribution and indemnification it would have done so." A-41.

Basis for Federal Jurisdiction of the District Court

The District Court had jurisdiction of the action in the first instance under section 502(e)(1) of ERISA (29 U.S.C. § 1132(e)(1)), which gives the district courts exclusive jurisdiction of civil actions for fiduciary breaches under ERISA. A-10.

WHY THE PETITION SHOULD BE GRANTED

This case concerns the interpretation of ERISA, a statute that has immediate importance to millions of American workers and their employers. The fundamental issue presented is whether, in an action against an ERISA trustee for breach of fiduciary duties, the trustee may complicate the lawsuit by seeking contribution or indemnity from others that ERISA labels as fiduciaries. The petition should be granted to resolve a conflict among the lower federal courts and because the decision of the majority below cannot be reconciled with recent decisions of this Court.

A. The circuit courts of appeals are in conflict regarding a right to contribution or indemnity under ERISA

The holding of the Second Circuit Court of Appeals that a right of contribution may be asserted as a matter of "federal common law" conflicts with decisions in other circuits.

This issue has arisen in the aftermath of a general repudiation by the courts of a right to contribution as an "implied" right. Under *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), if Congress does not expressly confer a right to seek contribution when it enacts a statute, a right of action may nevertheless be recognized (a) if Congressional intent to create the remedy is fairly implied from the statute, or (b) if the cause of action has "become part of the federal common law through the exercise of judicial power to fashion appropriate remedies." *Id.* at 90, 67 L. Ed. 2d at 762. Since ERISA contains no express right of action in favor of breaching fiduciaries for contribution or indemnity from co-fiduciaries, proponents of an ERISA right of contribution argued initially that it is "implied" in the statute.

The "implied right" argument for an ERISA right of contribution is now uniformly rejected. It founders on the very first prong of the familiar four-part analysis of *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26 (1975), since a trustee of an employee benefit plan is obviously not a member of the class for whose benefit ERISA was intended. As the majority below conceded, "ERISA was enacted to protect plan participants and beneficiaries, not former fiduciaries." A-34. A number of courts have refused to recognize an ERISA right of contribution or indemnity on this straightforward ground. *See Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991) (implicitly overruling *Alton Memorial Hospital v. Metropolitan Life Insurance Co.*, 656 F.2d 245 (7th Cir. 1981)).[1]

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[1] District court cases also so holding include *Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596 (N.D. Ill. 1989); *Collini v. Wean United, Inc.*, 101 F.R.D. 408 (W.D. Pa. 1983); *Brock v. Gillikin*, 677 F. Supp. 398 (E.D.N.C. 1987); *Franklin v. Aetna Life Insurance Co.*, 10 E.B.C. 1022 (D.S.C. 1988); *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421 (M.D. Ala. 1990); and *Physicians HealthChoice, Inc. v. Trustees of Automotive Employee Benefit Trust*, 764 F. Supp. 1360 (D. Minn. 1991).

But while arguments for an "implied" right of action for contribution have seemingly been laid to rest, the notion that there is a "federal common law" right of action for contribution has crept in the back door. The majority in the Second Circuit Court of Appeals below has now held that since ERISA appropriates certain terminology and principles from the common law of trusts, and since there is a common-law right of contribution among breaching trustees, "the traditional trust law right to contribution must also be recognized as a part of ERISA." A-35.

Other courts have reached the opposite conclusion. A Maryland district court has noted that Congress freely and deliberately drew from the common law of trusts in crafting ERISA and held that since a right of contribution — "a clearly established aspect of common law" — was not incorporated, "the omission would appear intended." *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 696 (D. Md. 1990).

Similarly, in *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989), the Secretary of Labor urged the Ninth Circuit Court of Appeals to fashion a right of contribution among co-fiduciaries as a matter of federal common law.[4] The court referred to what it deemed the Secretary's "persuasive arguments", but concluded that they had already been implicitly rejected in *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989), in which the Ninth Circuit had previously held that Congress did not intend to authorize remedies under ERISA that it did not expressly incorporate. 881 F.2d at 630-31. The Ninth Circuit had noted in *Kim* that the legislative history of ERISA contained no indication that Congress was concerned with softening the impact of

[4] The Secretary of Labor appeared as *amicus curiae* in *Call* and filed a brief devoted solely to urging that a right of contribution under ERISA be recognized under federal common law. A copy of the brief filed by the Secretary in *Call* is submitted herewith as part of the Appendix. A-42 to A-66.

the statute on joint wrongdoers. 871 F.2d at 1433. The Ninth Circuit has thus rejected *both* an implied right of contribution *and* a common-law right of action for contribution.[4]

The decisions of the lower federal courts are thus irreconcilable,[5] and, in view of the importance of the issue to millions of ERISA employers and fiduciaries, the conflict should be resolved by this Court.

B. The decision of the court below is inconsistent with this Court's repeated holdings that federal common law should be fashioned only to effectuate the policy of federal legislation

The decision of the lower court should also be reviewed because it conflicts with the views expressed by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), and other decisions in which this Court has set forth the principles underlying the creation, or "fashioning", of federal common law.

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[4] The fact that the Secretary of Labor urged a position on a common-law right of contribution in *Call* suggests that this Court may well wish to solicit the Secretary's views in the present matter.

[5] The novelty of the decision of the lower court and the resulting conflict between the Circuit Courts of Appeals has attracted immediate attention from professional publications and the business community. A forthcoming article notes the significance of a right of contribution in any ERISA lawsuit, recognizes the conflict with the Ninth Circuit represented by the Second Circuit's decision, and predicts much more litigation in the area. "2d Circuit Recognizes a Right to Contribution Among Breaching Fiduciaries," ERISA Litigation Reporter, Vol. 1, No. 4 (September-October, 1991). *See also* "ERISA Incorporates Common Law of Fiduciary Contribution, Indemnity," BNA Banking Daily (Sept. 4, 1991); "Court Holds Company Accountable for Pension Trustee's Actions," *Washington Post*, p. F11 (August 26, 1991); Chernoff, J., "Bank Gets Favorable Ruling; Fiduciaries Now Must Share Responsibility for Losses," *Pensions & Investment Age*, p. 2 (August 5, 1991).

1. ***Federal common law: interpretation versus rule-making***

In *Northwest Airlines*, this Court explained that federal common law has two distinct aspects. First, the federal courts interpret federal law:

> Broadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition.

451 U.S. at 95, 67 L. Ed. 2d at 765. The task of *interpreting* statutes in the common-law tradition is, however, markedly different from the much rarer role of the federal courts in *fashioning* law in areas where there is no legislation to interpret:

> The Court also has recognized a responsibility, *in the absence of legislation*, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States, or the resolution of interstate controversies.

Id. (emphasis supplied).

The majority below, however, ignored the crucial difference between the "interpretative" and "fashioning" aspects of federal common-law-making. As this Court has stated:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to *construe* a statute is fundamentally different from the authority to *fashion* a new rule or to provide a new remedy which Congress has decided not to adopt.

Id. at 97, 67 L. Ed. 2d at 767 (emphasis supplied).

2. *The courts may fashion common law only to serve legislative policy*

The instances in which the courts are authorized to fashion federal common law are " 'few and restricted'." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 68 L. Ed. 2d 500, 509 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 650, 10 L. Ed. 2d 605, 611 (1963)). This Court has, for example, identified areas of federal labor law in which Congress has expressly or impliedly created a right, but left it to the courts to fashion the nature and extent of the right or its remedy.[7] In commercial law, the Court has found that Congress left it to the courts to fashion uniform federal rules of law for United States checks.[8] The Court fashioned a "federal common law" of public nuisance where Congress had made it clear that claims regarding the pollution of interstate or navigable waters should be controlled by federal law;[9] similarly, the Court has resorted to federal common law to determine the apportionment of the waters of an interstate stream.[10] Admiralty and maritime law is a major area in

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[7] *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972 (1957) (rights under section 301 of the Labor Management Relations Act); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 89 L. Ed. 187 (1944) (rights under Railway Labor Act).

[8] *National Metropolitan Bank v. United States*, 323 U.S. 454, 89 L. Ed. 383 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367, 87 L. Ed. 838, 841 (1943).

[9] *Illinois v. City of Milwaukee*, 406 U.S. 91, 31 L. Ed. 2d 712 (1972).

[10] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 82 L. Ed. 1202 (1938).

which "Congress has largely left to [the] Court the responsibility for fashioning the controlling rules of admiralty law."[11]

The majority below thought that it was free to fashion a right of contribution under ERISA merely because Congress had omitted to provide for contribution. However, this Court has made it clear that the power of the federal courts to supplement statutory schemes with new rights or remedies exists only to give effect to policies expressed in federal statutes. *Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275, 287 (1990); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 1 L. Ed. 2d 972, 981 (1957) (federal common law is to be fashioned "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy"); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 89 L. Ed. 187 (1944) (the right fashioned was "implied from the statute and the policy which it has adopted"). As this Court stated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 11 L. Ed. 2d 804 (1964), "the federal interest guarded in all these cases is one the ultimate statement of which is derived from a federal statute." *Id.* at 426, 11 L. Ed. 2d at 822.

[11] *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 10 L. Ed. 2d 720, 724 (1963); *but see Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275, 287 (1990) (noting that the prerogatives of the federal courts in fashioning admiralty law are less restricted now that Congress has legislated so extensively in the area); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L. Ed. 2d 251 (1975); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 40 L. Ed. 2d 694 (1964) (recognizing right of contribution under federal admiralty in favor of shipowner against other joint tortfeasors); *cf. Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981) (noting that the *Stevedoring* decision did not establish a general federal right to contribution, since it was an instance of the particular power of the federal courts to fashion rules of law in admiralty cases).

There is no hint in the text or legislative history of ERISA of any policy that would be served by recognizing a right of contribution.[12] On the contrary, from beginning to end, ERISA reflects a single-minded congressional objective "to provide redress for plaintiffs — the plan's participants and beneficiaries," as the lower court itself recognized (A-39). "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142, 87 L. Ed. 2d 96, 103 (1984). In no way does recognizing a right of action for contribution tend to further the interests of plan participants and beneficiaries.

The holding of the majority below was based on its own sense of policy — unrelated to the policy of ERISA — that there is "no reason why a single fiduciary who is only partially responsible for a loss should bear its brunt." A-36. There was no reason *arising out of the policy of ERISA* for a right of contribution.

C. The creation of a new right of contribution disrupts the legislative balance struck by Congress in crafting ERISA

Just as the majority below failed to appreciate that the creation of new common-law rights of action is justified only to effectuate legislative policy, it also failed to note that the policy of ERISA

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[12] The majority below, noting that contribution was available to joint malfeasors under traditional trust law (A-35), evidently felt that Congress had imported the policy of trust law into ERISA wholesale. In fact, while ERISA does employ many concepts and much terminology from trust law, Congress did so selectively and, moreover, altered and embellished trust law in key substantive areas of ERISA. In particular, Congress defined "fiduciaries" much more broadly (see pages 16-18 and note 13 below) than under traditional trust law (see 29 U.S.C. § 1105(a) (A-4)). Consequently, it is an inappropriate leap of logic to conclude that *every* policy of traditional trust law is *also* a policy of ERISA.

could well be undermined by a right of action for contribution and indemnity. The majority below thus failed to consider the extent to which the creation of a new right of contribution "might upset carefully considered legislative programs." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981).

1. A chilling effect on employers and trustees

After seventeen years of implementation, ERISA now covers what must be literally millions of private pension plans. Obviously, however, many employers who have established ERISA plans lack not only the expertise to comply with the statute's technical requirements — which, indeed, have spawned a new breed of pension lawyers — but also an understanding of the prudent investment techniques mandated by ERISA. In authorizing employer-fiduciaries to delegate "exclusive authority and discretion to manage and control" plan assets (29 U.S.C. § 1103(a)) to trustees, therefore, Congress clearly expected that many employers — especially smaller companies like petitioner Fairway — would hire pension plan professionals to manage and invest plan assets. ERISA Section 405(a) (29 U.S.C. § 1105(a) (A-4), for example, which limits the liability of a co-fiduciary to circumstances in which he either participates in a breach, enables another fiduciary to commit a breach, or fails to act reasonably when a breach comes to his attention, appears to have been drafted specifically with such employer-fiduciaries in mind.

The limitations of section 405(a) strongly suggest that Congress wanted to protect employers who, in good faith, entrust plan assets to trust companies like respondent Sovran and other professionals. Congress patently did not want the fear of being sued to discourage small employers from establishing retirement plans. Such a result would have worked against "the public interest in encouraging the formation of employee benefit plans" (*Pi-*

lot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 52 (1987)) and the interests of the workers for whose benefit ERISA was enacted in the first place (see 29 U.S.C. § 1001(a)).

The result below will surely tend to discourage small employers like Fairway from establishing ERISA plans. A similar chill will fall on professional trustees like co-petitioner Chemung. Knowledgeable professionals will be reluctant to step into situations where malfeasance by former trustees is suspected if they can be subjected to the sort of counter-attack launched on Chemung by Sovran in the present case.

The result portended by the majority below thus threatens to expose employers like Fairway, and professionals like Chemung, to new liabilities that will disrupt Congress's carefully considered legislative program. ERISA Section 403(a) allowed Fairway to appoint and rely on "professionals" to properly oversee investment of plan assets. But the third-party complaint against Fairway attempts to hold Fairway responsible for the precise functions Dawson and later Sovran *itself* were hired to perform. Liability of this character is not consistent with the policies of ERISA. Under *Northwest*, recognition of a common-law right of action for contribution and indemnity in these circumstances is impermissible.

2. Greater expense and effort for ERISA plaintiffs

A rule allowing claims for contribution will interfere with the Congressional scheme in another way as well. According to the majority in the Second Circuit, an ERISA plaintiff "does not care whether the defendant has a right of contribution against others, as long as the plaintiff recovers the amount to which he is entitled." On the contrary, however, ERISA plaintiffs care about their ability to prosecute claims quickly and economically. This Court is well aware that the proliferation of multi-party lawsuits in recent years has contributed heavily to the length and expense of litigation. Each new party to an action generates more pleadings, more depositions, more document production, more motions, more time from the institution of an action until trial, and longer trials. An ERISA plaintiff is prejudiced when his lawsuit is complicated with unwanted counterclaims and third-party actions.

This very case illustrates the point. The action was born as a straightforward claim on behalf of a pension plan against a former trustee who had neglected his fiduciary obligations to the plan. Thanks to the contribution claims sanctioned by the majority below, however, it has mushroomed into an expensive multi-party maze of original claims, counterclaims, and third-party claims. There are now 12 parties, most of whom appear in several different capacities in the two-page caption of the case. There is no longer one main issue in the action; there are at least half a

dozen. The original plaintiffs can no longer focus their energies on proving Sovran Bank's breach of fiduciary duty, as the interests of the plan and its beneficiaries would suggest. Instead, they are themselves on the defensive. The resources of Fairway Spring Co., Inc., which created and maintains the plan, are diluted and diverted from the main object.

Compounding the problem is the fact that the possibilities for third-party actions against ERISA "fiduciaries" are legion — far greater than under traditional trust law. ERISA defines a fiduciary broadly as any person who (1) exercises any discretionary authority or discretionary control respecting the management of an employee benefit plan or the management or disposition of its assets, (2) renders investment advice for a fee or other compensation with respect to any monies or other property of the plan, or (3) has any authority or responsibility to do so, or (4) has any discretionary authority or discretionary responsibility in the administration of the plan. 29 U.S.C. § 1002(21)(A). Under ERISA, as under traditional trust law, the very nature of roles such as plan trustee requires performance of one or more of these functions and thus gives rise to fiduciary status. 29 C.F.R. § 2509.75-8, at D-3. However, Congress intended the definition to be broadly construed to include persons who have authority and responsibility over a plan, without regard to their particular titles. *Donovan*

v. Mercer, 747 F.2d 304 (5th Cir. 1984).[13] Indeed, the United States Department of Labor has indicated that even *participants* of a plan can be fiduciaries when, for example, they are given respon-

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[13] The following cases indicate the breadth and variety of persons and entities that have been found to be fiduciaries under ERISA:

1. Pension plan service company (*Brock v. Self*, 632 F. Supp. 1509 (W.D. La. 1986));

2. Officers and directors of plan service company (*Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980));

3. Officer of employer sponsoring plan (*Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988));

4. Parent company of employer sponsoring plan (*Hazel v. Curtiss-Wright Corp.*, 12 E.B.C. 1810 (S.D. Ind. 1990));

5. Insurance company which sold annuity contract to plan (*Peoria Union Stock Yards Company Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983));

6. Insurance company providing coverage under health plan (*Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990));

7. Insurance broker/consultant to plan (*Brink v. DaLesio*, 496 F. Supp. 1350 (D. Md. 1980), *aff'd in relevant part*, 667 F.2d 420 (4th Cir. 1981).

8. Stock broker assigned to pension plan account (*Stanton v. Shearson Lehman/American Express, Inc.*, 631 F. Supp. 100 (N.D. Ga. 1986));

9. Union representative recommending specific dental program for collectively bargained health plan (*Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988));

10. Arbitrator asked to resolve claim for pension benefit (DOL Advisory Op. No. 79-66A (September 14, 1979));

11. Arbitrator selected to settle dispute between union and employer trustees of collectively bargained plan (DOL Advisory Op. No. 82-42A (August 16, 1982));

12. Illinois Director of Insurance acting under state order to liquidate health plan (*Mutual Life Ins. Co. of New York v. Yampol*, 840 F.2d 421 (7th Cir. 1988));

13. Receiver appointed by bankruptcy court for company sponsoring plan (*Kaleidoscope, Inc. Profit Sharing Plan v. Scroggins*, 492 F. Supp. 1027 (N.D. Ga. 1980));

14. Resolution Trust Corporation exercising receivership powers over failed savings and loan association sponsoring plan (*Rosa v. Resolution Trust Corp.*, 752 F. Supp. 1231 (D.N.J. 1990), *reversed on other grounds*, 938 F.2d 383 (3d Cir. 1991)); and

15. Attorney advising plan participant regarding benefit paid from plan (*Chapman v. Klemick*, 750 F. Supp. 520 (S.D. Fla. 1990)).

sibility for voting stock allocated to their plan accounts. Letter from Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, U.S. Department of Labor (Feb. 23, 1989).

Consequently, ERISA fiduciary status may be acquired, even unknowingly, in ways unheard of under the common law of trusts. The number of ERISA fiduciaries with respect to a single plan is thus much greater than under traditional trust law (29 C.F.R. § 2509.75-8 at FR-12), as is the potential for multiplied claims, counterclaims, and third-party claims for contribution among fiduciaries in a single action. If the broad ERISA definition of "fiduciary" is taken into account, it becomes even more inconceivable that Congress contemplated or approved rights of action for contribution or indemnity against fiduciaries like Fairway Springs and its officers and agents.

The result of the determination below will be to make ERISA litigation more drawn-out, expensive, complicated, and uncertain for the very class of persons ERISA was intended to benefit. Of course, if Congress had actually determined that ensuring a more equitable distribution of liability was worth imposing delay, expense, and complication on ERISA plaintiffs, it would be a different matter. The involuntary metamorphosis of a two-party lawsuit into complex multi-party litigation would be beside the point. But even the lower court conceded that there was no evidence in the legislative history of ERISA that Congress was concerned that a breaching fiduciary might have to pay more than his fair share. A-39 to A-40.

This Court stated in *Russell* that it was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 147, 87 L. Ed. 2d 96, 106 (1984). The lower court clearly did not share that reluctance, and its creation of a potentially disruptive new right of action should be reviewed by this Court.

D. Under *Russell*, the courts should not fashion common-law rights or remedies that were omitted from the comprehensive legislative scheme of ERISA

As Justice O'Connor recently emphasized in *Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275 (1990), the power of the federal courts to fashion common law exists only at the sufferance of Congress. 112 L. Ed. 2d at 287. Consequently, new rights or remedies should not be fashioned without considering what Congress has already done in the area:

> The *presumption* that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary *may not*, in the face of . . . comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981) (emphasis supplied). This presumption was ignored by the majority in the court below.

The recognition of an ERISA right of action of contribution or indemnity clearly constitutes fashioning "a new remedy". Indeed, *Northwest Airlines* itself involved the issue of whether "federal common law" should be invoked to create a right to contribution in the context of the Equal Pay Act; the Court declined to do so on the explicit ground that the comprehensive statute precluded the courts from fashioning new remedies. *Id.* at 97-98, 67 L. Ed. 2d at 767-68.

Similarly, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 68 L. Ed. 2d 500 (1981), this Court again declined to create a right of contribution — this time under the Sherman Act — for precisely the same reason: it would amount to creating

a cause of action in the face of detailed, specific remedial provisions in a comprehensive statute. *Id.* at 644-46, 68 L. Ed. 2d at 511-12.[14]

Faced squarely with the issue of whether to create an ERISA right of contribution among co-fiduciaries as a matter of "federal common law", therefore, the Second Circuit should have considered, in the first instance, whether the ERISA statute amounts to a "comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981). That question has been answered by this Court on several occasions:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's *interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."*

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 106 (1984) (declining to authorize recovery of punitive damages) (emphasis supplied). *Accord, Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108, 103 L. Ed. 2d 80, 91 (1989) (noting that ERISA provides a "panoply" of remedies); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 95 L.

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[14] Contrary to this Court's holdings in *Northwest Airlines* and *Texas Industries*, the majority in the lower court asserted that a right of contribution was not a "right of action", but merely a "procedural device". A-34. It is odd, however, for petitioner Fairway Spring Co., Inc. to be held in as a third-party defendant in this action if Sovran Bank has no "right of action" against it.

Ed. 2d 39, 52 (1987) (noting the "deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies").

Indeed, ERISA defines the rights and obligations of fiduciaries and trustees — including co-fiduciaries — in detail. ERISA Section 403 (29 U.S.C. § 1103) specifies, for example, that the assets of every employee benefit plan must be held by an appointed trustee who "shall have exclusive authority and discretion to manage and control the assets of the plan." Section 404 (29 U.S.C. § 1104) requires that plan assets be diversified and invested as a "prudent man" would do. ERISA's detail extends to the different forms of relief available, including different forms of monetary and injunctive relief, attorneys' fees, and civil penalties, *see* 29 U.S.C. § 1132(a), (g), and (i). For each form of relief available, ERISA Section 502(a) specifies persons entitled to bring an action. 29 U.S.C. § 1132(a). Significantly, co-fiduciaries are not among those specified.

With equal significance, ERISA sets forth, narrowly and carefully, the precise circumstances under which a fiduciary may be held liable for a co-fiduciary's breach. Section 405(a) of ERISA provides:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). "[T]his section parrots the Restatement (Second) of Trusts § 224(2) . . . ." *NARDA, Inc. v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F. Supp. 685, 697 (D. Md. 1990).

In section 405(a), therefore, Congress expressly determined that there should be circumstances under which co-fiduciaries could be jointly liable for ERISA breaches, and in section 502(a), Congress specified the persons entitled to sue for various forms of relief. Having touched the subject this closely, Congress went no further. Congress did not provide for a third-party right of action for contribution or indemnity.

This Court observed in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), that the responsibility of the judiciary to *fashion* federal common law — not merely to construe or interpret, but to acknowledge new rights and remedies — arises in "the *absence* of legislation." *Id.* at 95, 67 L. Ed. 2d at 765 (emphasis supplied). But there was no "absence of legislation" in the present case. On the contrary, there was a veritable abundance of legislation. The majority below thus not only failed to take into account that ERISA is, taken as a whole, a " 'comprehensive and reticulated statute' " with an "interlocking, interrelated, and interdependent remedial scheme," as this Court had already held in *Russell*, but also ignored the fact that Congress even included specific provisions for liability of co-fiduciaries — *the very subject area* in which the court was being asked to create a new right under "federal common law"!

These matters did not escape the district court below, which wrote:

> As section 1105(a) demonstrates, Congress carefully and narrowly defined the circumstances under which a fiduciary could be held personally liable for a co-fiduciary's breach. . . . Given Congress' attempts to "precisely tailor fiduciary liability to fit particular breaches, . . . [i]t is not surprising that rights of indemnification and contribution among culpable fiduciaries are not provided.

Chemung Canal Trust Co. v. Sovran Bank/Maryland, 753 F. Supp. 81, 84 (W.D.N.Y. 1990) (Telesca, J.) (A-20).

Judge Altimari, dissenting from the majority decision below, was of the same view:

> It seems clear that Congress was aware that the issue of fiduciary indemnification and contribution was bound to arise under ERISA. Indeed, a section of the statute delineates the circumstances in which a co-fiduciary may be liable for another fiduciary's breach of fiduciary responsibility. *See* 29 U.S.C. § 1105 (1988). Moreover, it is equally apparent that Congress was conscious that the general principles of trust law, upon which ERISA is based, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), would allow a breaching fiduciary to obtain indemnification and contribution from other wrongdoers. *See Restatement (second) of Trusts* § 258 (1959). Despite its obvious awareness of both the problem at hand and its potential solution, Congress, in crafting ERISA's "interlocking, interrelated and interdependent remedial scheme," *see Russell*, 473 U.S. at 146, failed to provide remedies in favor of breaching fiduciaries. Essentially, Congress' omission of all references to the allocation of costs among fiduciaries for joint liabilities demonstrates its rejection of the scheme of contribution and indemnification adopted by the majority.

A-41.

The majority in the Court of Appeals ignored the "comprehensive legislative scheme" represented by ERISA and thus failed to give effect to the "strong presumption" (*see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981)) that Congress deliberately omitted a right of contribution against co-fiduciaries from ERISA. The determination below should be reviewed by this Court.

E. The majority below erroneously interpreted this Court's decision in *Firestone* as a general authorization for judicial enactment of new ERISA rights and remedies

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 92 (1989), this Court observed that because ERISA has its roots in American trust law and terminology, the courts must " 'develop a federal common law of rights and obligations under ERISA-regulated plans.' " *Id.* at 110, 103 L. Ed. 2d at 92 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 95 L. Ed. 2d 39, 53 (1987)). The Court also alluded to remarks of the late Senator Jacob Javits, in connection with the Congressional enactment of ERISA, expressing an expectation that a body of federal substantive law would be developed by the courts. *Id.* at 110, 103 L. Ed. 2d at 92.

Led on by respondent Sovran, the majority in the Court of Appeals misapprehended and misapplied the Court's observations in *Firestone*. Its decision seized upon the Court's language as an open invitation to fashion new rights and remedies as "federal common law" under ERISA. A-35. "[U]nder ERISA," the lower court held, "both the legislative history and the statute itself clearly contemplate development of a federal common law." A-37.

The majority below ignored the fundamental distinction, explained by this Court in *Northwestern Airlines, Inc. v. Transport*

Workers Union, 451 U.S. 77, 67 L. Ed. 2d 750 (1981), between the frequent duty of the courts to employ "federal common law" in *construing* and *interpreting* statutes, and the limited authority of the courts to *fashion* rights and remedies as "federal common law". Its decision also failed to consider that the issues in *Firestone* did not involve either creating a new right or remedy. On the contrary, Congress had, in 29 U.S.C. § 1132(a)(1)(B), "explicitly" authorized civil actions by employees to enforce their rights to pension benefits. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 92 (1989). However, ERISA did "not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." Thus, in *Firestone*, Congress had plainly established, by statute, an ERISA right to sue, but had left to the courts the task of fleshing out that right — a task which this Court performed in the common-law tradition by reference to traditional principles and rules of trust law. This was "federal common law", to be sure, but it was an instance of supplying "a need for judicial interpretation of ambiguous or incomplete provisions." *Northwestern Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981). It did not amount to fashioning a new right or remedy.

It is respectfully submitted that this Court never intended to sanction wholesale creation of new substantive rights and remedies under ERISA as "federal common law". That error underlies the decision of the majority below, which should be reviewed by this Court.

CONCLUSION

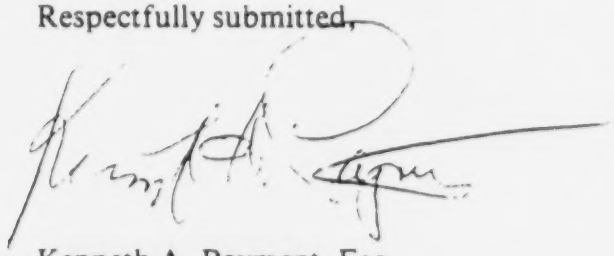
The majority below ignored this Court's admonition that new rights and remedies should not be created in the face of a comprehensive statutory scheme of enforcement. The lower court was thus not warranted in creating a new right of action for contribu-

tion or indemnity in favor of one ERISA fiduciary against another under the guise of "federal common law". The majority below similarly disregarded this Court's direction that new "federal common law" rights be grounded in legislative policy; the right of contribution it "fashioned" not only has no basis in ERISA policy, but positively undermines it.

With circuit courts divided on this issue, Fairway respectfully urges that the Court grant the petition and set the case for argument.

October 21, 1991

Respectfully submitted,



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No. (2)

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Supreme Court of the United States

October Term, 1991

FAIRWAY SPRING CO., INC.; THEODORE PATERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

APPENDIX TO PETITIONS

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ERISA § 2, 29 U.S.C. § 1001

Findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore de-

sirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

ERISA § 404, 29 U.S.C. § 1104

Fiduciary duties

(a)(1) Subject to sections 403(c) and (d) [29 USC § 1103(c) and (d)], 4042 [29 USC § 1342], and 4044 [29 USC § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USC § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USC § 1107(d)(4) and (5)]).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exer-

cises control over the assets in his account (as determined under regulations of the Secretary)-

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

ERISA § 405, 29 U.S.C. § 1105

Liability for breach by co-fiduciary

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 USC § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b)(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 USC § 1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees-

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [29 USC § 1103(a)(1)].

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary re-

sponsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that-

(A) the named fiduciary violated section 404(a)(1) [29 USC § 1104(a)(1)]

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 USC § 1102(c)(3)].

(d)(1) If an investment manager or managers have been appointed under section 402(c)(3) [29 USC § 1102(c)(3)], then, notwithstanding subsections (a) (2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

ERISA § 409, 29 U.S.C. § 1109

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USC § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA § 502, 29 U.S.C. § 1132

Civil enforcement

(a) A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

(b)(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of the subtitle [29 USC §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if —

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation

affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USC § 1145].

(c)(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 USC § 1166(1) or (4)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USC § 1021(b)(4)]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 USC § 1024(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USC § 1021(d)] with respect to any participant or beneficiary may in the court's discretion be liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizen-

ship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USC § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan-

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of-

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 [26 USC § 6621].

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under sub-

section (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USC § 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 [29 USC § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 USC § 4975(f)(5)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 USC § 4975(f)(4)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USC § 4975(e)(1)].

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USC § 518(a)]), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action con-

trary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(1)(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USC §§ 1101 et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 USC § 4975].

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHEMUNG CANAL TRUST COMPANY, As Trustee of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN, WILLIAM H. BROWN and JOSEPH R. PETERS,

Plaintiffs,

v.

SOVRAN BANK/MARYLAND,

Defendant and Third-Party Plaintiff,

v.

FAIRWAY SPRING CO., INC., THEODORE PETERSON, As President and Director of FAIRWAY SPRING CO., INC., DONALD R. PETERSON, As Vice-President and Director of FAIRWAY SPRING CO., INC., DOROTHY TARY, As Secretary-Treasurer of FAIRWAY SPRING CO., INC., and JOHN DOE and JANE DOE, As Members of the INVESTMENT COMMITTEE OF THE FAIRWAY SPRING COMPANY, INC. RESTATED RETIREMENT INCOME PLAN, and LYNN KEYSER,

Third-Party Defendants.

CIV-90-0013T
DECISION
AND ORDER

INTRODUCTION

The Chemung Canal Trust Company (Chemung), as the present trustee of the Fairway Spring Company, Inc. Restated Pension Plan (the Plan), and two beneficiaries of the Plan brought this action against Sovran Bank/Maryland (Sovran) pursuant to the Employee Retirement Income Security Act (ERISA). Plaintiffs allege that Sovran, which was trustee of the Plan immediately prior to Chemung, breached its fiduciary duties by failing to exercise prudence and due diligence in discovering and rectifying the wrongful acts of Glenn Dawson, who had been trustee of the Plan before Sovran. Plaintiffs further allege that Sovran itself made two "disastrous" investments which also constituted a breach of its fiduciary duty.

Sovran then filed a third-party complaint against Fairway Spring Co. (Fairway), the employer who established the Plan, for indemnity and/or contribution, alleging that Fairway is a fiduciary of the Plan, and as a result of its own breach of its duty with regard to the activities of Dawson, it must either indemnify Sovran or contribute to satisfaction of the judgment should Sovran be found liable. Sovran also filed a counterclaim against Chemung Canal Trust, alleging that it failed to evaluate adequately and pursue claims of the Plan and this failure contributed to the losses which are the subject of its present suit against Sovran. It requests relief on behalf of the Plan, as well as contribution and or indemnity should it be found liable.

Fairway, the third party defendant, now moves to dismiss Sovran's third party complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that ERISA does not permit a fiduciary to sue a co-fiduciary for indemnification or contribution. Chemung moves to dismiss Sovran's counterclaim for indemnification or contribution for essentially the same reasons — that ERISA does not allow fiduciaries to seek contribution or

indemnity. In addition, Chemung moves to dismiss Sovran's counterclaim on behalf of the Plan because Sovran is no longer a trustee and thus does not have standing to sue. For the reasons discussed below, the motions of Chemung and Fairway are granted and accordingly, Sovran's counterclaims and third-party complaint are dismissed.

DISCUSSION

A. *SOVRAN'S STANDING TO SUE ON BEHALF OF THE PLAN:*

The defendant Sovran brings a counterclaim against Chemung on behalf of the Plan, alleging that Chemung breached its fiduciary duty by failing adequately to evaluate and pursue claims of the Plan. Sovran claims that, as a former fiduciary, it has a continuing obligation to address and attempt to remedy breaches on behalf of the Plan. After carefully reviewing the relevant authority, I find that Sovran is without standing to bring such a claim.

Section 409 of ERISA contemplates actions by four classes of plaintiffs: the Secretary of Labor, beneficiaries, participants, and fiduciaries. 29 U.S.C. § 1132. Because Sovran is no longer a fiduciary, it has no standing to sue Chemung on behalf of the Plan. *Blackmar v. Lichtenstein*, 603 F.2d 1306, 1310 (8th Cir. 1979); *see also Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir. 1986).

In *Blackmar,* the settlor of a plan governed by ERISA removed the plan's then trustee and appointed a new trustee in accordance with the provisions of the plan. 603 F.2d at 1308. The former trustee, Charles Blackmar, challenged the settlor's actions, alleging that the settlor breached its fiduciary duty by removing him in order to preclude him from filing a suit against it. *Id.* at 1309. The court held that it could not "deem Blackmar a fiduciary, though he once was, and allow him to bring suit in a fiduciary

capacity" when he had been removed in a manner consistent with the trust document itself. *Id.; see also Blassie v. Kroger Co.*, 345 F.2d 58, 67 (8th Cir. 1965) ("a fiduciary, after his removal or resignation, does not have sufficient official interest to authorize him to seek appellate relief of an adverse judgment...."). The court concluded that, "[i]n short, *Blackmar* no longer has an interest in this suit." *Blackmar*, 603 F.2d at 1309.

This case presents a situation analogous to that in *Blackmar*. Chemung replaced Sovran as trustee of the Plan, but did not obtain fiduciary status until after Sovran was terminated. Sovran now essentially challenges Chemung's failure to include Fairway in an action against Sovran for breach of its fiduciary duties. ERISA, however, provides adequate protection to plans and their participants, in that either they or the Secretary of Labor have standing to bring suit if Chemung breaches any of its fiduciary duties. *See Blackmar*, 603 F. 2d at 1310. Accordingly, because Sovran is a stranger to the Plan in so far as any alleged breach by Chemung, it has no standing to assert a counterclaim on behalf of the Plan.

B. *SOVRAN'S CLAIMS FOR CONTRIBUTION AND INDEMNITY:*

Sovran's remaining claims against plaintiff Chemung and third-party defendant Fairway are for contribution and/or indemnity. Essentially, Sovran argues that if it is found to have breached its fiduciary duties, that it should be able to recover all or part of the judgment from Chemung and Fairway, which it claims are also liable.

In order to find a cause of action for indemnity and/or contribution, the court must determine either that Congress expressly provided for it or Congress' intent to allow it is clearly implied in

the statute, or that the cause of action has become part of federal common law. *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638 (1981) (holding that no cause of action for contribution and/or indemnity exists under Federal Anti-trust law).

Although the Second Circuit has indicated that a fiduciary *may* be able to seek indemnification from a co-fiduciary under ERISA, it has neither considered nor decided this issue. *See Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989). It is uncontroverted that ERISA does not explicitly provide for fiduciary contribution or indemnity. The parties differ, however, on whether the statute implies a cause of action and whether one exists or should be created as part of the federal common law.

Where it is alleged that a statute implies a right of action, the Court must focus on Congressional intent through examination of the legislative history and other factors such as "the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief." *Texas Industries*, 451 U.S. at 639.

In enacting ERISA, Congress repeatedly expressed its intent that the statute "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds," and "reduce substantially the potentialities for abuse" by fiduciaries. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 137, 140 n.8 (1985) (remarks of Sen. Bentsen, Sen. Nelson, reprinted in 3 Leg. Hist. 4795, 4803; 120 Cong. Rec. 29954, 29957 (1974)). Nowhere, however, does the legislative history suggest that Congress intended that a fiduciary be allowed to seek contribution or indemnity for a breach of its fiduciary responsibilities.

In fact, Congress has carefully set forth those acts or omissions for which a fiduciary *is* personally liable. *Narda, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685,

696-97 (D. Md. 1990). For example, a fiduciary is liable for a co-fiduciary's breach *only*

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). As section 1105(a) demonstrates, Congress carefully and narrowly defined the circumstances under which a fiduciary could be held personally liable for a co-fiduciary's breach. *See* 29 U.S.C. § 1105(a)(3); *Narda*, 744 F. Supp. at 696. Given Congress' attempts to "precisely tailor fiduciary liability to fit particular breaches, . . . [i]t is not surprising that rights of indemnification and contribution among culpable fiduciaries are not provided." *Narda*, 744 F. Supp. at 696. Thus, the intent to allow a fiduciary to sue for contribution and/or indemnity is absent both from the express language of ERISA and from its legislative history.

Furthermore, a fiduciary is not a member of the class for whose benefit ERISA was enacted. *Id.* (Congress intended to "protect participants, beneficiaries and plans, and remedies are provided to fiduciaries only insofar as they advance that purpose"); *see also Russell*, 473 U.S. at 3090 ("A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan...."). The lack of reference to contribution or indemnity, together with

the fact that fiduciaries are not members of the class which ERISA was designed to protect, makes it clear that Congress did not intend to imply a cause of action for contribution or indemnity in their favor. *See Texas Industries*, 451 U.S. at 638-39.

> Indeed, implying a right of contribution is particularly inappropriate where, as in this case, the party seeking contribution " 'is a member of the class [e.g., fiduciaries] whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class [e.g., ERISA plans],' " and where there is no indication in the legislative history "that Congress was concerned with softening the blow on joint wrongdoers."

Kim v. Fujikawa, 871 F.2d 1427, 1433 (9th Cir. 1989) (citing *Texas Industries*, 451 U.S. at 639); *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989); *but see Free v. Briody*, 732 F.2d 1331, 1337 (7th Cir. 1984).

Accordingly, if Sovran is entitled to contribution or indemnity under ERISA, the source of such a right must be federal common law. *Texas Industries*, 451 U.S. at 640. The Supreme Court has indicated that federal courts should hesitate to "find" a cause of action in federal common law, and should do so only where it is "necessary to protect uniquely federal interests," or where "Congress has given the courts the power to develop substantive law." *Id.* at 640 (citations omitted). In this case, there are no interests which are uniquely federal; "contribution among [ERISA fiduciaries] does not involve the duties of the Federal Government, the distribution of powers on our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Id.* at 642.

The courts may also fashion federal common law when Congress has empowered them to create guiding rules of law under a comprehensive statutory scheme. *Id.* In enacting a such a statute, Congress may give the courts broad power to develop substantive law consistent with the purpose of the statute. *Id.* at 643. Such a

grant does not, however, necessarily imply that Congress intended to give the courts equally broad power to formulate enforcement remedies or to fashion additional forms of relief. *Id.* at 643-44; *see Russell*, 473 U.S. at 147-48.

The Supreme Court has held that courts are empowered under ERISA to develop a substantive common law of rights and obligations under ERISA-regulated plans, consistent with trust principles. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 5. Ct. 948, 954 (1989). Nevertheless, "the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Russell*, 473 U.S. at 145; *Franklin v. Aetna Life Ins. Co.*, 10 Emp. Ben. Cases 1022, 1026 (D.C.S.C. 1988) (adding a cause of action to ERISA in favor of fiduciaries is "not a situation where Congress has empowered the courts to develop substantive law.").

In *Russell*, the Supreme Court recognized ERISA's "carefully integrated civil enforcement provisions" and "interlocking, interrelated, and interdependent remedial scheme," and expressed its reluctance to "tamper with an enforcement scheme crafted with such evident care." 473 U.S. at 146-47. The Court noted that the courts should be wary of adding additional remedies under a statute such as ERISA, especially where Congress has provided an integrated and comprehensive remedial plan. *Id.* at 147; *See also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981); *Texas Industries*, 451 U.S. at 645-46. When the entire structure of ERISA is examined together with its enforcement provisions, fiduciary liability provisions and legislative history, it must be concluded that Congress did not intend the courts to create a right of contribution and indemnity in favor of fiduciaries. *See Russell*, 473 U.S. at 148.

In sum, the courts may develop substantive common law under ERISA only where it is consistent with Congressional intent. *See Russell*, 473 U.S. at 145; *Texas Industries*, 451 U.S. at 643-44.

Sovran has not demonstrated that Congress in any way intended that ERISA should benefit fiduciaries. In fact, it is clear that Congress intended to *regulate* the conduct of fiduciaries for the exclusive benefit of pension plans, participants and beneficiaries. Because it would be inconsistent with Congress' stated purposes in enacting ERISA, a right of action in favor of fiduciaries for contribution or indemnity cannot be justified under federal common law.

CONCLUSION

Having carefully considered the existing authority on the issue of whether or not a fiduciary can assert a claim for contribution or indemnity, this court finds that such a claim is not supported either by statutory interpretation of ERISA or by federal common law. Accordingly, Sovran's third party complaint against Fairway and cross-claim against Chemung for contribution and indemnity are dismissed. In addition, Sovran's cross-claim against Chemung on behalf of the Plan is dismissed because Sovran lacks standing to bring such an action.

ALL OF THE ABOVE IS SO ORDERED.

s/ MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
December 27, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHEMUNG CANAL TRUST COMPANY, ET AL.,

Plaintiffs

- vs -

SOVRAN BANK/MARYLAND,

Defendant and Third-Party Plaintiff

CIV-90-0013T

- vs -

FAIRWAY SPRING CO., INC., ET AL.,

Third-Party Defendants

Take notice of an Order, of which the within is a copy, duly granted in the within entitled action on the 16th day of January, 1991, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 16th day of January, 1991.

Dated: Rochester, New York
January 16, 1991

Clerk
United States District Court
Western District of New York
282 U.S. Courthouse
Rochester, New York 14614

TO: Edward B. Hoffman, Esq.
Lonie Hassel, Esq.
Kenneth A. Payment, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHEMUNG CANAL TRUST COMPANY, As Trustee of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN, WILLIAM H. BROWN and JOSEPH R. PETERS,

Plaintiffs,

v.

SOVRAN BANK/MARYLAND,

Defendant and Third-Party Plaintiff

v.

FAIRWAY SPRING CO., INC., THEODORE PETERSON, As President and Director of FAIRWAY SPRING CO., INC., DONALD R. PETERSON, As Vice-President and Director of FAIRWAY SPRING CO., INC., DOROTHY TARBY, As Secretary-Treasurer of FAIRWAY SPRING CO., INC., and JOHN DOE and JANE DOE As Members of the INVESTMENT COMMITTEE OF THE FAIRWAY SPRING CO., INC. RESTATED RETIREMENT INCOME PLAN, and LYNN KEYSER,

Third-Party Defendants.

CIV-90-0013T
AMENDMENT TO DECISION AND ORDER FILED DECEMBER 27, 1990

The Decision and Order entered in this case on December 27, 1990 is amended to include the following:

This decision is interlocutory in nature, and thus not ordinarily immediately appealable. It involves a "controlling question of law" which has not yet been decided in the Second Circuit, and "as to which there is a substantial ground for difference of opinion," namely, whether, under ERISA, a fiduciary may sue another fiduciary for indemnification or contribution. 28 U.S.C. § 1292(b). Immediate appeal of this issue to the Second Circuit may materially advance the ultimate termination of this litigation, and would prevent the parties from having to relitigate much of the case should the Second Circuit find after a final decision has been rendered, that ERISA does permit a fiduciary to sue for indemnification or contribution. 28 U.S.C. § 1292(b).

ALL OF THE ABOVE IS SO ORDERED.

s/ MICHAEL A. TELESCA

United States District Judge

DATED: Rochester, New York
January 16, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1624 — August Term 1990

(Argued: June 5,1991 Decided: July 25, 1991)

Docket No. 91-7194

CHEMUNG CANAL TRUST COMPANY, as Trustee of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN; WILLIAM H. BROWN; JOSEPH R. PETERS,

Plaintiffs.

CHEMUNG CANAL TRUST COMPANY, as Trustees of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN,

Plaintiff-Appellee,

-against-

SOVRAN BANK/MARYLAND,

Defendant-Appellant.

SOVRAN BANK/MARYLAND,

Third-Party Plaintiff-Appellant,

-against-

FAIRWAY SPRING CO., INC., THEODORE PETERSON, as President and Director of FAIRWAY SPRING CO., INC.; DONALD R. PETERSON, as Vice President and Director of FAIRWAY SPRING CO., INC.; DOROTHY TARBY, as Secretary-Treasurer and Director of FAIRWAY SPRING CO., INC.; JOHN DOE; JANE DOE, as members of the INVESTMENT COMMITTEE of the FAIRWAY SPRING CO., INC. RESTATED RETIREMENT INCOME PLAN; LYNN G.

KEYSER,

Third-Party Defendants,

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as Director of FAIRWAY SPRING CO., INC.; DONALD R. PETERSON, as Vice President and Director of FAIRWAY SPRING CO., INC.; DOROTHY TARBY, as Secretary-Treasurer and Director of FAIRWAY SPRING CO., INC. and LYNN G. KEYSER,

Third-Party Defendants-Appellees.

Before:

OAKES, *Chief Judge,*
PRATT and ALTIMARI, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Western District of New York, Michael A. Telesca, Chief Judge, dismissing defendant's counterclaim and third-party complaint after holding (1) that defendant, a former fiduciary, does not have standing to sue on behalf of a plan under ERISA, and (2) that there is no cause of action for contribution and indemnity under ERISA.

Affirmed on the standing issue; reversed and remanded on the contribution and indemnity issue.

Judge Altimari concurs in part and dissents in part in a separate opinion.

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KENNETH A. PAYMENT, Rochester, NY (Harter, Secrest & Emery, Robert F. Pizzo, of Counsel), *for Third-Party Defendants-Appellees.*

EDWARD B. Hoffman, Elmira, NY (Sayles, Evans, Brayton, Palmer & Tifft, Donna L. Mitchell), *for Plaintiff-Appellee.*

PRATT, *Circuit Judge:*

Defendant-third-party plaintiff-appellant Sovran Bank/Maryland ("Sovran") appeals from a judgment of the United States District Court for the Western District of New York, Michael A. Telesca, Chief Judge, entered pursuant to a certification under Fed. R. Civ. P. 54(b). The judgment dismissed Sovran's counterclaim and third-party complaint based on the court's holdings that (1) as a former fiduciary, Sovran had no standing to sue on behalf of the Fairway Spring Co., Inc. Restated Retirement Income Plan ("the plan"), under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461, ("ERISA"), and (2) Sovran had no cause of action for contribution or indemnity under ERISA. We agree with the district court that ERISA does not grant standing to former fiduciaries, and we affirm the judgment on that issue. However, we conclude that ERISA does not preclude a cause of action for contribution or indemnity. We therefore reverse the judgment of the district court on that issue and remand for further proceedings consistent with this opinion.

BACKGROUND

Fairway Spring Company, Inc. ("Fairway") established the plan in 1981 to provide retirement benefits for its employees. Under the terms of the plan, Fairway, acting through its officers, has the authority to appoint a trustee for the plan. As the plan's first

trustee, Fairway appointed Glen Dawson, who made imprudent investments and engaged in transactions prohibited under ERISA's fiduciary standards.

Effective December 1, 1984, Fairway removed Dawson as trustee, and appointed Sovran as his replacement, effective February 1,1985. During the two-month interim period, Lynn Keyser, counsel to Fairway, exercised fiduciary authority over the plan and its assets.

Some of Dawson's imprudent investments performed adequately for a time after Sovran's appointment as trustee. Eventually, however, payments owed to the plan under some of these investments ceased. In 1989, Fairway removed Sovran as trustee and appointed Chemung Canal Trust Company ("Chemung") as the new trustee.

Chemung, as the present trustee of the plan, along with two beneficiaries of the plan, brought this ERISA action against Sovran, the former fiduciary, alleging that Sovran had breached its fiduciary duties to the plan. Chemung sought to recover for the losses caused by Sovran's lack of prudence and due diligence with respect to some of the original investments made by Dawson but continued by Sovran, as well as two other questionable investments that Sovran itself had entered into on behalf of the plan.

Sovran counterclaimed against Chemung and filed a third-party complaint against Fairway, its officers, certain members of an investment committee of the plan, and Lynn Keyser, counsel to Fairway (hereinafter collectively referred to as "Fairway"). Sovran alleged that Fairway had breached its fiduciary duties by failing to monitor Dawson's activities, to correct Dawson's fiduciary breaches, and to disclose them to Sovran. It claimed that Fairway had a duty to monitor Dawson's performance, and that it knew or should have known of Dawson's fiduciary breaches, but, without acknowledging or taking action to remedy those

breaches, Fairway had merely removed Dawson as trustee. As against Chemung, Sovran's successor trustee, Sovran alleged that Chemung had failed to adequately evaluate and pursue claims of the plan and that this failure contributed to the losses which were the subject of its present suit against Sovran. Sovran requested relief directly on behalf of the plan, as well as contribution or indemnity should it be found liable to the plan.

Fairway moved to dismiss Sovran's third-party complaint, pursuant to Fed. R. Civ. P. 12(b)(6), claiming that ERISA did not allow claims for contribution or indemnity. Chemung joined in this motion. In addition to the contribution and indemnity argument, Chemung argued that Sovran lacked standing to sue on behalf of the plan, because it was no longer a fiduciary.

The district court granted these motions and dismissed the counterclaim and third-party complaint, holding (1) that Sovran had no standing and (2) that there was no cause of action for contribution or indemnity under ERISA. The district court then entered an order pursuant to Fed. R. Civ. P. 54(b), authorizing entry of a final judgment as to those claims, thereby permitting an immediate appeal. Such an appeal, wrote the court, "would promote judicial economy and reduce the expenses of both parties by eliminating the potential for duplicative litigation involving substantially similar facts". Sovran now appeals both holdings.

DISCUSSION

A. *Standing*

Sovran claims that as a former fiduciary it has a right under ERISA to sue on behalf of the plan to recover for the plan's losses. We disagree. Section 502 of ERISA, 29 U.S.C. § 1132(a), specifies those who may bring actions under ERISA and the types of actions each may pursue. The statute names only three classes of persons who may commence an action, and a former

fiduciary is not one of them. Those who can sue are: (1) a participant or beneficiary, (2) the Secretary of Labor, and (3) a fiduciary. 29 U.S.C. § 1132(a).

We have previously determined that, in the absence of some indication of legislative intent to grant additional parties standing to sue, the list in § 502 should be viewed as exclusive. *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983) (rejecting standing of plan itself); *see also Tuvia Convalescent Center, Inc. v. National Union of Hospital & Health Care Employees*, 717 F.2d 726, 730 (2d Cir. 1983) (rejecting standing of employer). There is no indication of any legislative intent to grant a former fiduciary a continuing right to sue on behalf of the plan; consequently, *Pressman* controls, and Sovran's claim falls for lack of standing.

The eighth circuit, in *Blackmar v. Lichtenstein*, 603 F.2d 1306 (8th Cir. 1979), considered the same issue under a fact pattern that was even stronger for Sovran's position. Nevertheless, that court held that a former fiduciary does not have standing to sue on behalf of the plan, even when he was removed for the very purpose of preventing his bringing suit. There, the trustee, Blackmar, filed suit against former trustees and informed the employer that he planned to join the employer as a party defendant. To prevent this, the employer promptly removed Blackmar as trustee and appointed a successor. Blackmar challenged his removal and the appointment of new trustees, thus raising the issue of whether a former fiduciary had standing to challenge such an appointment. The eighth circuit held that once the former trustee had been removed, he ceased to be a fiduciary and could no longer sue for violations of fiduciary duty: "Adequate protection is afforded the beneficiaries under Section 502. * * * In short, Blackmar no longer has an interest in this suit." *Id.* at 1310.

Sovran claims that *Blackmar* is distinguishable because Sovran is not challenging the validity of Chemung's appointment, as was the case in Blackmar, but instead seeks merely to advance claims on behalf of the plan. We reject the proffered distinction. The crux of the eighth circuit's holding was that a former fiduciary no longer has an interest in protecting a plan to which it is now a complete stranger. Like *Blackmar,* Sovran is no longer a fiduciary of the plan and cannot be deemed one for purposes of asserting a claim under ERISA. Thus, we affirm the district court's rejection of standing for former fiduciaries under ERISA.

B. *Contribution or Indemnity*

We next address the issue of whether ERISA permits a claim for contribution or indemnity. The district court rejected such a cause of action, relying primarily on the methodology of *Cort v. Ash*, 422 U.S. 66 (1975), for determining whether a private right of action should be implied from a statute. Sovran argues that the district court erred by using an inappropriate test to dismiss its contribution claims. It contends not that contribution should be recognized as an implied right of action, but that congress intended to embody fundamental trust law principles, including contribution, into the federal law governing employee benefit plans, and directed the courts to develop a substantive federal common law of ERISA, by drawing upon those principles. Sovran recognizes that ERISA does not explicitly provide for contribution and indemnity, but argues that because a fiduciary's right to seek contribution and indemnity is a fundamental principle of equity jurisprudence governing the law of trusts, these remedies should be incorporated into the federal common law of ERISA.

The Supreme Court has indicated in other contexts that a right to contribution may be recognized "through the affirmative creation of a right of action by Congress, either expressly or by clear

implication", or "through the power of federal courts to fashion a federal common law of contribution". *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). In ERISA, congress never dealt with contribution expressly, so the question is whether such a right can be recognized either by implication from the statute, or as a part of federal common law.

Initially, we agree with Sovran that the *Cort v. Ash* methodology is an inappropriate tool for analyzing this case. In *Cort v. Ash*, the Supreme Court devised a four-part test to determine whether a right of action should be implied from a federal statute. If applied here, the *Cort v. Ash* test would cause an automatic dismissal of Sovran's claims, because the first part of the test asks whether the party seeking the remedy [Sovran] is a member of the class for whose benefit the legislation was intended [plan participants and beneficiaries], and clearly, ERISA was enacted to protect plan participants and beneficiaries, not former fiduciaries such as Sovran. 29 U.S.C. §1001. Such an analysis is too simplistic, however, for the problem before us.

Here, we are not dealing with the usual "right of action", and it would be misleading to so characterize a defendant's right of contribution. A plaintiff who brings an action does not care whether the defendant has a right of contribution against others, as long as the plaintiff recovers the amount to which he is entitled. Contribution deals with allocating obligations among co-defendants and/or third parties. The "right of action" for contribution is no more than a procedural device for equitably distributing responsibility for plaintiff's losses proportionally among those responsible for the losses, and without regard to which particular persons plaintiff chose to sue in the first instance. The four tests of *Cort v. Ash* are not well-designed to ferret out congressional intent at this level of dispute resolution.

The next question, whether federal courts have power to fashion a federal common law under ERISA, need not detain us very

long. The Supreme Court has left no doubt that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (*quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). It has stated: "ERISA abounds with the language and terminology of trust law. * * * ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§1101-1114, 'codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.' " *Firestone*, 489 U.S. at 110 (citations omitted). *See also Donovan v. Bierwirth*, 754 F.2d 1049,1055 (2d Cir. 1985) ("We thus look to principles developed under the common law of trusts, which in large measure remain applicable under ERISA."); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) ("In developing a law of remedies, the Congress intended the federal courts to draw on principles of traditional trust law."). We thus hold that the federal courts have been authorized to develop a federal common law under ERISA, and in doing so, are to be guided by the principles of traditional trust law.

We must next determine whether traditional trust law provides for a right of contribution among defaulting fiduciaries. Indisputably, it does. Chemung and Fairway do not seriously contend to the contrary, nor could they, because the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine. *See* Restatement (Second) of Trusts § 258 (1959); Bogert, *The Law of Trusts and Trustees*, § 701 (2d ed. rev. 1982) (citing *Perry v. Knott*, 4 Beav. 179 (1842); *Sherman v. Parish*, 53 N.Y. 483 (1873)).

We thus conclude that the traditional trust law right to contribution must also be recognized as a part of ERISA. By so concluding, we are not creating a right from whole cloth. We are simply following the legislative directive to fashion, where congress has not spoken, a federal common law for ERISA by incorporat-

ing what has long been embedded in traditional trust law and equity jurisprudence. Such a rule would have no financial impact on the recovery of plaintiffs, the intended beneficiaries of ERISA. They would continue to recover their full loss from any or all breaching fiduciaries, each of whom would be jointly and severally liable to the plaintiffs.

We see no reason to reject contribution as an equitable means of apportioning wrongdoing in this context. Although it is arguable that injecting contribution claims into an already complex area of litigation will only further complicate matters and build costs, we think that even a breaching fiduciary should be entitled to the protection of contribution that has been traditionally granted fiduciary defendants under the equitable provisions of trust law. There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt. Full responsibility should not depend on the fortuity of which fiduciary a plaintiff elects to sue.

In arguing that a cause of action for contribution should not be recognized under ERISA, Fairway and Chemung rely heavily on *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers Union of America*, AFL-CIO, 451 U.S. 77 (1981). In *Texas Industries*, the Supreme Court rejected a defendant's right to seek contribution from a co-conspirator in a treble damages claim under the antitrust laws. It first rejected contribution under the implied right of action analysis, and then rejected it as part of a court's power to create federal common law under a particular statutory scheme. The Court looked to the legislative histories of the Sherman Act and the Clayton Act and determined that congress did not intend to confer common law rule-making power on the courts in the context of those treble damage remedies. *Id.* at 644-45. It concluded that neither act conferred power on the court to formulate a right to contribution. *Id.* at 646.

Similarly, in *Northwest*, the Supreme Court declined to recognize a right to contribution under the Equal Pay Act or Title VII of the Civil Rights Act. It rejected such a right under the implied right of action analysis as well as under a power to create federal common law, because the Court found that congress had not authorized common law rule-making power under either Title VII or the Equal Pay Act. *Id.* at 97. Thus, in both *Texas Industries* and *Northwest*, the Supreme Court rejected invitations to include a right of contribution as part of the federal common law surrounding the relevant statutes, because it concluded that congress had not authorized courts to do so in connection with those particular statutes.

Texas Industries and *Northwest* are distinguishable, however. Although it rejected the authority of the federal courts to develop a federal common law under the antitrust laws, Title VII, and the Equal Pay Act, the Supreme Court drew a sharp contrast with other areas of the law, such as admiralty and labor relations, where our power to fashion rules of federal common law is well established. Just as with the Labor Management Relations Act, under ERISA, both the legislative history and the statute itself clearly contemplate development of a federal common law. Thus, *Texas Industries* and *Northwest* are not impediments to our holding that, under ERISA, a federal common law, including the traditional trust concept of a right to contribution, is appropriate.

Fairway and Chemung also argue that the instances where the Supreme Court has recognized the need to formulate federal common law are limited to situations in which (1) a federal rule of decision is necessary to protect unique federal interests, or (2) congress has specifically given the courts the power to develop substantive law. *Texas Industries*, 451 U.S. at 640. Clearly, no unique federal interest is involved in this case, *see id.* at 642, and Fairway and Chemung contend that congress's intent to augment ERISA with certain common law principles should not be viewed

as an assignment to the courts to create distinct and substantive rights for persons the statute was not meant to benefit.

In other words, Fairway and Chemung, relying on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134,146 (1984), argue that the authority to develop common law does not include the power to create new substantive rights. They claim that because congress could easily have expressly included a right to contribution among the remedies allowed under ERISA, but intentionally chose not to do so, we should not recognize such a right.

In *Russell*, the Supreme Court dismissed a plan beneficiary's action to recover extracontractual, compensatory and punitive damages, which were not expressly authorized under ERISA. It found, first, that the legislative history did not indicate that congress intended the particular relief sought. Second, it turned to the statute and found a comprehensive legislative scheme which indicated that the omission of such a remedy was intentional:

> The six carefully integrated civil enforcement provisions found in [29 U.S.C. § 1132(a)] of the statute as finally enacted, * * * provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated stature.'

Russell, 473 U.S. at 146 (citation omitted).

As Sovran points out, however, the decision in *Russell* did not discuss the availability of federal common law remedies, either for participants, who are granted a variety of express personal remedies by the statute, or more pertinently, for others who, like

fiduciaries, are granted no express personal remedies by the statute. The concurring opinion in *Russell* further illuminates this point:

> [I]n resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies. If a requested form of additional relief is available under state trust law, courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. In addition, courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA-enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries.

Russell, 473 U.S. at 157-58 (Brennan, J., concurring).

Congress's failure to include enforcement provisions to address the relationships among fiduciaries does not necessarily mean that congress intended to preclude such remedies. ERISA was designed specifically to provide redress for plaintiffs — the plan's participants and beneficiaries. *See* 29 U.S.C. § 1001. Its remedies do not purport to deal with allocating joint liabilities among fiduciaries, which is the essence of the problem facing us. Although this silence on the contribution issue might be argued to mean that ERISA allows only those claims that directly benefit the plan or a participant, and intentionally bars relief in all other situations, there is nothing but silence to support this conclusion.

A more likely inference is that when it came to remedies under ERISA, congress simply did not focus its attention beyond the

welfare of the plan's participants and beneficiaries. It does not follow, however, that congress would have rejected contribution claims had the issue been expressly considered. On the contrary, congress wanted courts to fill any gaps in the statute by looking to traditional trust law principles. We conclude that incorporating traditional trust law's doctrine of contribution and indemnity into the law of ERISA is appropriate.

CONCLUSION

We affirm the district court's holding that a former fiduciary does not have standing to sue on behalf of the plan. We reverse the district court's holding that there can be no cause of action for contribution or indemnity under ERISA, and remand the case for further proceedings.

ALTIMARI, *Circuit Judge*, Concurring in part and Dissenting in part:

Although I am in great sympathy with the majority's holding and am impressed with its reasoning, I must dissent from that portion of the majority's decision which finds that ERISA provides fiduciaries with causes of action for indemnification and contribution. While the majority's decision makes good sense, such good sense does not always find its way into legislation enacted by Congress, as the statute at issue demonstrates. Therefore, I write separately.

I do not believe that in this instance we can, in effect, legislate that Congress intended to leave open to courts the right to fashion common law remedies of indemnification and contribution under ERISA. Though Congress has endowed courts with the power to formulate federal common law in ERISA cases, it has not given the federal judiciary the power to "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to

provide." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 137, 145 (1985) (quoting *California v. Sierra Club, 451 U.S. 287, 297 (1981)).*

It seems clear that Congress was aware that the issue of fiduciary indemnification and contribution was bound to arise under ERISA. Indeed, a section of the statute delineates the circumstances in which a co-fiduciary may be liable for another fiduciary's breach of fiduciary responsibility. *See* 29 U.S.C. § 1105 (1988). Moreover, it is equally apparent that Congress was conscious that the general principles of trust law, upon which ERISA is based, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), would allow a breaching fiduciary to obtain indemnification and contribution from other wrongdoers. *See* Restatement (second) of Trusts § 258 (1959). Despite its obvious awareness of both the problem at hand and its potential solution, Congress, in crafting ERISA's "interlocking, interrelated and interdependent remedial scheme," *see Russell*, 473 U.S. at 146, failed to provide remedies in favor of breaching fiduciaries. Essentially, Congress' omission of all references to the allocation of costs among fiduciaries for joint liabilities demonstrates its rejection of the scheme of contribution and indemnification adopted by the majority. Simply stated, if Congress had intended to include a right of action for contribution and indemnification it would have done so.

For the reasons set forth above, I would affirm the judgment of the district court in all respects.

No. 88-15076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STERLING CALL, ET AL.,

Plaintiffs-Appellants

v.

SUMITOMO BANK OF CALIFORNIA, ET AL.,

Defendants-Appellees

On Appeal From The United States District
Court For The Northern District of California

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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Argument:

ERISA ALLOWS A FIDUCIARY WHO HAS REIMBURSED A PLAN FOR LOSSES INCURRED AS A RESULT OF A FIDUCIARY BREACH TO MAINTAIN AN ACTION AGAINST A CO-FIDUCIARY WHO IS JOINTLY AND SEVERALLY LIABLE FOR THE BREACH.

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

INTEREST OF THE SECRETARY OF LABOR

This case involves the scope of the remedies available for correcting violations of the fiduciary provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA or the Act"), 29 U.S.C. § 1001 *et seq.* The Secretary of Labor ("the Secretary") has primary enforcement authority for correcting such violations and, therefore, has a substantial interest in ensuring that the remedies available under ERISA are not restricted.

The district court concluded that ERISA's comprehensive civil enforcement scheme reflects a Congressional intent that only those remedies explicitly enumerated in ERISA are available under the statute. Because the reasoning of the court could be applied to restrict the use of remedies developed by the federal

courts under the common law of trusts, the Secretary has a substantial interest in having the district court's decision reversed.

STATEMENT OF THE ISSUE

Whether a fiduciary who has reimbursed a plan for losses incurred as a result of a fiduciary breach may maintain an action for contribution under Section 502 of ERISA, 29 U.S.C. §1132, against a co-fiduciary who is jointly and severally liable for the breach.[1]

STATEMENT OF THE CASE

A. *Jurisdiction and Appealability*

1. Jurisdiction of the district court

The district court's jurisdiction arises from ERISA §502(e), 29 U.S.C. §1132(e).

2. Jurisdiction of the Court of Appeals

The court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

3. Appealability of the order

This order of the district court dismissing the complaint is a final order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

4. Timeliness of Appeal

The order appealed from was entered by the district court on June 28, 1988. Appellants filed a timely notice of appeal on July 28, 1988.

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[1] The Secretary takes no position on the other issues raised in this appeal.

B. *Procedural History*

This action was brought by members of the Administrative Committees of the Phase II Corporation Restated Profit Sharing Plan and the California Etching Corporation Restated Profit Sharing Plan ("the Plans") under Sections 409 and 502 of ERISA, 29 U.S.C. §§1109 and 1132, against Khateeb Lateef and Lateef Management Associates, the investment advisors to the Plans, Sumitomo Bank of California, the trustee of the Plans, and Ray W. Sherman, an escrow agent of the Plans, in connection with a real estate investment of the Plans. The complaint sought, *inter alia*, contribution from the defendants for amounts deposited into the Plans by the plaintiffs in settlement of claims made by the Secretary concerning breaches of fiduciary duty with respect to the real estate investment. The complaint alleged that the defendants also breached their fiduciary duties in connection with the real estate investment, and, therefore, are equally liable for the losses to the Plans.

The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. On June 28, 1988, the district court dismissed the complaint, holding, *inter alia*, that ERISA, on its face, does not authorize a fiduciary to bring suit against his co-fiduciaries for contribution, and that the statutory language, structure, and legislative history of ERISA indicate that Congress did not intend to authorize remedies other than those explicitly provided for in the statute.

C. *Statement of facts*

In December 1980, the Administrative Committees of the Plans decided to invest in a residential real estate development project. The Plans initially invested $100,000 each in the project, and later invested an additional $30,000 each. The Administrative Committees made these investment decisions on the advice

of Khateeb Lateef and Lateef Management Associates, the investment advisors to the Plans. As part of the real estate transaction, Sumitomo Bank, the trustee for the Plans, and Roy Sherman, the escrow holder, executed escrow instructions. These instructions provided that Sherman would deliver to Sumitomo Bank a recorded deed of trust securing promissory notes that the Plans had received in return for their investment. However, neither Sherman nor Sumitomo Bank recorded the trust deed.

On June 4, 1984, the real estate project in which the Plans had invested filed for bankruptcy. Because the Plans were unsecured as a result of the failure to record the trust deed, the investment by the Plans was a total loss.

The Department of Labor investigated the Plans' investment in the real estate project, and determined that the Plans' fiduciaries had violated ERISA in their participation and handling of the real estate investment. The Department sought restitution of the funds lost as a result of the investment from members of the Plans' administrative committees. Those individuals settled the claims made by the Department through a combination of deposits to the Plans and forfeitures of their own individual accounts in each Plan. The forfeitures and deposits equaled the lost principal and earnings. The members of the administrative committees then brought this action seeking contribution from Lateef, Lateef Management Associates, Sumitomo Bank, and Sherman.

ARGUMENT

ERISA ALLOWS A FIDUCIARY WHO HAS REIMBURSED A PLAN FOR LOSSES INCURRED AS A RESULT OF A FIDUCIARY BREACH TO MAINTAIN AN ACTION AGAINST A CO-FIDUCIARY WHO IS JOINTLY AND SEVERALLY LIABLE FOR THE BREACH.

A. *Congress intended for the courts to create a federal common law in determining what "other appropriate equitable relief" is available to remedy fiduciary violations of ERISA.*

It is well established that a federal remedy such as contribution may be created through the power of the federal courts to fashion appropriate remedies for unlawful conduct as part of the federal common law. *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). While the power of the courts to create federal common law is limited, it does exist in those instances when Congress has given the courts the power to develop substantive law. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *Texas Industries*, 451 U.S. at 640. For example, the Supreme Court has read section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), as not only granting the federal courts jurisdiction over certain areas of labor law but also as vesting in the courts the power to develop a common law of labor-management relations by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

The intent of Congress to have the courts develop a federal common law with respect to the fiduciary provisions of ERISA, similar to the power granted to the courts to develop a federal common law of labor-management relations, is clear from the legislative history of ERISA. ERISA represents the culmination of almost ten years of effort by Congress to develop uniform, nationally applicable standards for the administration of private sector employee pension and welfare benefit plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). A primary purpose of Congress was to federalize and apply the protections of trust law to employee benefit plans and to have the federal courts draw on principles of traditional trust law to fashion appropriate remedies. *Eaves v. Penn*, 587 F.2d 453,

462 (10th Cir. 1978). This intent to make the common law of trusts applicable to employee benefit plans by development of federal substantive law is clear from the statement of Senator Williams, one of two principal Senate sponsors of ERISA, who emphasized that suits involving beneficiaries' rights "will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act." 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). Similarly, Senator Javits, the other principal Senate sponsor of ERISA, stated, "[I]t is ... intended that a body of federal substantive law will be developed by the courts to deal with the issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). *See Franchise Tax Board of California v. Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1983).

Consequently, while ERISA, in its entirety, is a "comprehensive and reticulated statute", Nachman, 446 U.S. at 361, the fiduciary responsibility standards contained in Part 4 of Title I set forth only a broad outline of a fiduciary's duty to a plan, and are not meant to restrict the full scope of the those standards and their application in concrete situations. *Menhorn v. Firestone Tire and Rubber Co.*, 758 F.2d 1496, 1499 (9th Cir. 1984). Instead, "[t]he courts are directed to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA, referring to and guided by principles of state law when appropriate, but governed by the federal policies at issue." *Menhorn*, 738 F.2d at 1500. *See also Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069; *Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978).

Similarly, the civil enforcement provisions contained in ERISA §§502(a)(2), (3), and (5), 29 U.S.C. §1132(a)(2), (3), and (5), set forth the broad spectrum of remedies available to redress

violations of the fiduciary responsibility provisions of ERISA, but by the language of the provisions themselves, are not limited to explicitly defined remedies. For example, ERISA §502(a)(2) authorizes the Secretary, a participant, beneficiary or a fiduciary to bring a civil action for "appropriate relief" under Section 409 of ERISA, 29 U.S.C §1109. ERISA §502(a)(3)(B) authorizes a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of Title I or to enforce provisions of Title I or the terms of the plan. Finally, ERISA §502(a)(5) grants the Secretary the power, *inter alia*, "to obtain other equitable relief."

Justice Brennan, in his concurring opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, (1984), noted, "The legislative history demonstrates that Congress intended federal courts to develop common law in fashioning the additional 'appropriate equitable relief'." 473 U.S. at 156. If the requested form of relief is available under state trust law, "courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme", 473 U.S. at 157-8. *See also Eaves, supra.* Consistent with this mandate, courts have made numerous remedies available under section 502 of ERISA that are not specifically set forth in the statute, but which are borrowed from state trust law. *See, e.g., Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) (trustees of plans have the authority to audit employer records); *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (upholding order requiring appellants to post $1 million bond); *Crawford v. LaBoucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir. 1987) (upholding order offsetting profit sharing plan fiduciaries' interests in plan); *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (upholding right to appointment of a receiver). *But cf., Nieto v.*

Ecker, 845 F.2d 868 (9th Cir. 1988) (holding that a non-fiduciary may not be sued as a knowing participant in a fiduciary breach).[2]

B. *Recognition of a right of contribution is consistent with the Congressional directive to look to the common law of trusts in fashioning equitable remedies under ERISA.*

An application of the standards set forth by Justice Brennan in his concurring opinion in *Russell* establishes that a right of contribution should be made available under ERISA. Recognition of the right of contribution is consistent with the Congressional directive to look to the common law of trusts in fashioning equitable remedies under ERISA, since it is well established under general trust principles that a fiduciary who makes good a loss resulting from a fiduciary breach is entitled to contribution from other fiduciaries with whom he is jointly and severally liable. *See* A. Scott, Law of Trusts §258 (4th ed. 1988); Restatement (Second) of Trusts §258 (1959). Moreover, the remedy of contribution does not conflict with any other aspect of the ERISA scheme, and, as in this case, may actually promote the best interest of participants and beneficiaries.

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[2] In *Nieto* a panel of this court held that ERISA does not authorize suit against a non-fiduciary as a knowing participant in a fiduciary breach, relying upon *Russell* for the proposition that Congress did not intend to authorize remedies that were not expressly included in ERISA. We believe that the *Nieto* panel, like the district court here, incorrectly expanded *Russell's* holding beyond the benefit claims area, and disregarded the substantial legislative history establishing that Congress intended to incorporate the common law of trusts to remedy breaches of fiduciary duty. Moreover, the panel's decision in *Nieto* is in conflict with the Supreme Court's decision in *Central States, supra*, with a decision of another panel of this Court in *Mazzola, supra*, and with a long line of authority reaching a contrary result on the issue of knowing participation. *See, e.g., Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987); *Thorton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982).

A primary focus of ERISA'S enforcement scheme is to put the plan in the position it would have occupied but for the breach of fiduciary duty, i.e. to make employee benefit plans whole in situations where assets or income have been lost as a result of fiduciary breaches. *See Freund v. Marshall & Ilsley Bank*, 485 F.Supp 629, 643 (W.D. Wis. 1979); *Gilliam v. Edwards*, 492 F.Supp. 1225, 1266-67 (D.N.J. 1978); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1980). A right of contribution encourage a fiduciary to voluntarily restore losses to the plan caused by his and another's fiduciary breaches, since he then has the right to seek contribution from his co-fiduciaries who may be equally culpable. Consequently, a right of contribution increases the likelihood that the Secretary will be able to obtain restitution without a full trial of the merits. Indeed, it is unlikely that the plaintiffs here would have agreed to completely compensate the Plans for losses had they realized that they would be unable to obtain contribution from other fiduciaries who may be equally culpable. Because a right of contribution encourages fiduciaries to remedy breaches by voluntarily restoring losses to a plan, such a right furthers the intent of Congress to protect the financial integrity of employee benefit plans, and should be included among the remedies available under ERISA.

Because the rights of contribution and indemnification are available under the common law of trusts, courts have recognized the rights of contribution and indemnification as equitable remedies available under the civil enforcement provisions of ERISA. *Free v. Briody*, 732 F.2d 1331 (7th Cir. 1984); *Alton Memorial Hosp. v. Metropolitan Life Insurance Co.*, 656 F.2d 245 (7th Cir. 1981); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D. Wis. 1979); *Whitfield v. Lindemann*, 853 F.2d 1298,

1303 (5th Cir. 1988); *Brock v. Self*, 632 F.2d 1509 (W.D. La. 1986).[1]

The district court distinguishes this case from the Seventh Circuit's decision in *Free v. Briody, supra*, placing great significance on the fact that *Free* involved a passive trustee seeking indemnity from an active co-trustee for his misconduct, and that the Seventh Circuit's award of indemnification was confined to "the limited circumstances" of the case. The district court concluded that, because the plaintiffs here were not passive wrongdoers, the trust principles invoked in *Free* would not apply. The district court's suggestion that the *Free* decision was limited to the narrow circumstances of the case, however, misses the point. The *Free* court held that ERISA authorizes the right of indemnification, and that an award of indemnification under the circumstances of the case was justified. Clearly, the circumstances of each case determine whether contribution may be justified, but to state that there is no right to contribution because an award may be justified only in narrow circumstances would, in colloquial terms, "put the cart before the horse".

The district court also rejects the reasoning of *Free* because its statement that plan fiduciaries are among the class for whose especial benefit ERISA was enacted "flies in the face" of the statute's stated purpose to protect the interests of participants and beneficiaries. As explained above, however, a right of contribu-

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[1] In *Franklin v. Aetna Life Insurance Co.*, 10 E.B.C. 1022 (D.S.C. 1988) and *McClendon v. Continental Group, Inc.*, 7 E.B.C. 2403 (D.N.J. 1986), the courts found no right of contribution in ERISA. The *McClendon* court did not consider whether a right of contribution could arise under federal common law, since the parties neither briefed nor argued the proposition. The *Franklin* court concluded that this was not a situation where Congress has empowered the courts to develop substantive law, erroneously citing *McClendon* for that proposition. We believe that both courts were incorrect in finding no right of contribution under ERISA for the same reasons that the district Court here was incorrect.

tion would result in protection of the interests of participants and beneficiaries, since it would encourage a fiduciary to restore losses to the plan on the assumption that he will be able to recapture a portion of those losses from his co-fiduciaries.

Finally, the district court misreads *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1984) when it states that *Free* cannot be reconciled with *Russell*. The question in *Russell* was whether ERISA authorizes recovery of extra-contractual compensatory and punitive damages caused by improper and untimely processing of benefit claims. The Supreme Court found no intent on the part of Congress to include such damages under the "other equitable relief" provisions of section 409 of ERISA, 29 U.S.C. §1109. Significantly, an award of compensatory or punitive damages is generally considered to be a legal rather than an equitable remedy, and is not generally available under the common law of trusts. Since Congress authorized other "equitable relief" in Section 409 and expressed its intent that courts develop such relief based upon trust law, there was no discernable intent on the part of Congress to include extra-contractual punitive and compensatory damages among the remedies available under ERISA.

Moreover, the district court reads *Russell* too broadly when it states that *Russell* stands for the proposition that the only remedies available to redress fiduciary breaches are those specifically enumerated in the statute. *Russell* involved issues relating to the processing of benefit claims, and the statutory provision in ERISA concerning claims for benefits are separate and more specific than those concerning general fiduciary breaches. Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), authorizes suit by a participant to recover benefits available to him, to enforce his rights under the terms of the plan, and to clarify his rights to future benefits under the terms of the plan, but does not allow a participant to bring suit to obtain any other relief, legal or equita-

ble, with respect to claims for benefits. Additionally, section 503 of ERISA, 29 U.S.C. §1133, authorizes the Secretary to promulgate regulations requiring plans to provide adequate notice in writing to participants whose claims for benefits have been denied and to afford a reasonable opportunity for a hearing to such participants. Those sections, read together, indicate that Congress intended to limit the remedies available to participants with respect to benefit claims to those specifically set forth in ERISA and to those that the Secretary, through the regulatory process, determines are necessary. Consequently, with respect to claims for benefits, ERISA provides a comprehensive remedial scheme with no evidence of an intent on the part of Congress to have the courts fashion additional remedies.

In contrast, the remedial provisions of section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), relating to breaches of fiduciary duty, are much broader than those in section 502(a)(1), 29 U.S.C. § 1132(a)(1), and specifically authorize suit by a fiduciary "to obtain other appropriate equitable relief." 29 U.S.C. §1132(a)(3)(B). To restrict the remedies available under ERISA to those specifically enumerated would make section 502(a)(3)(B) meaningless, and would ignore the Congressional mandate to create federal common law with respect to the fiduciary provisions of ERISA.

As the district court noted, the Ninth Circuit extended the analysis in *Russell* to section 502(a)(3) in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), and held that suit for extra-contractual compensatory and punitive damages is not authorized by that section either. *Sokol*, however, did not involve ERISA fiduciary provisions, but, like *Russell*, involved an award of extra-contractual compensatory and punitive damages with respect to a benefit claim. The same reasoning which compelled rejection of that award in Russell also compelled rejection of the award in *Sokol*.

To read both *Sokol* and *Russell* so broadly as to eliminate remedies for fiduciary breaches available under the common law of trusts from ERISA's remedial scheme would not only be inconsistent with the legislative history of ERISA, but also with the Supreme Court's interpretation of the statute. In *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), the Court stated, "Rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." And in *Pilot Life Insurance Co. v. Dedeaux*, 109 S.Ct 1549 (1988) the Court acknowledged the Congressional intent "that a federal common law of rights and obligations under ERISA-regulated plans would develop."

Finally, the district court's comparison of *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) to this case ignores a significant distinguishing factor. In *Northwest Airlines*, there was no intent on the part of Congress to have the federal courts develop a federal common law under either the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964. Consequently, the Supreme Court was required to determine whether Congress intended to create the specific remedy of contribution when it enacted those statutes by using the standards set forth in *Cort v. Ash*, 422 U.S. 66 (1975). However, as shown above, Congress clearly intended for equitable remedies available under the common law of trusts to be incorporated into ERISA's remedial scheme. To bar such equitable remedies because they are not specifically enumerated would "tamper with the enforcement scheme crafted with such evident care", a result that the Supreme Court cautioned against in *Russell*, 473 U.S. at 134. Instead, the courts should determine whether the remedy is available under traditional trust law, and then determine whether it "would significantly conflict with some other aspect of the ERISA scheme". *Russell*, 473 U.S. at 157. A right of contribution is

available under traditional trust law, and would not conflict with any other aspect of the civil enforcement scheme of ERISA. It should, therefore, be included among the remedies available under the statute.

CONCLUSION

For the foregoing reasons, the Secretary respectfully urges that the lower court's decision be reversed.

Respectfully submitted,

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Nos. 91-680 and 91-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FAIRWAY SPRING CO., INC., THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

v.

SOVRAN BANK/MARYLAND,

Respondent.

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

v.

SOVRAN BANK/MARYLAND,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

May the courts develop a federal common law of contribution among fiduciaries under the Employee Retirement Income Security Act of 1974 ("ERISA") in accordance with Congress's instruction, as acknowledged by the Court, to develop federal common law under ERISA based on trust law?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-680

FAIRWAY SPRING CO., INC., THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

v.

SOVRAN BANK/MARYLAND,

Respondent.

No. 91-681

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

v.

SOVRAN BANK/MARYLAND,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Recognizing the authority granted by Congress to the federal courts under ERISA to develop a federal common law of ERISA based on the common law of trusts, the court of appeals reversed the dismissal of Sovran Bank/Maryland's[1] ("Sovran") federal common law counter-

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[1] C&S/Sovran Corporation is Sovran's parent. Sovran has no non wholly-owned subsidiaries.

claim and third party claims for contribution and indemnity against other fiduciaries of the Fairway Spring Company, Inc. Restated Retirement Income Plan ("Plan"). Appendix ("A.") 27-41. Those other fiduciaries seek a writ of certiorari from this Court.

Fairway Spring Company, Inc. ("Fairway") established the Plan in 1981 to provide retirement benefits for its employees. A. 29. Under the terms of the Plan, Fairway has the authority to appoint a trustee of the Plan. *Id.* Acting through its officers, petitioners Theodore Peterson, Donald R. Peterson, and Dorothy Tarby, Fairway appointed Glen Dawson as the Plan's trustee. A. 29-30.

While trustee of the Plan, Dawson made imprudent investments for the Plan and engaged in transactions prohibited under ERISA's fiduciary standards. A. 30. For example, Dawson invested in various interest bearing notes that purportedly were secured by real property. Dawson failed to investigate the validity of the notes, the creditworthiness of the obligors, or the validity of the security interests supporting the notes. Further, he failed to obtain proper documentation of the Plan's investments in these notes and failed to perfect security interests in the collateral. He also generally failed to diversify the Plan's investments. Joint Appendix to Appellate Briefs ("J.A.") 10-12. Dawson's breaches of fiduciary duty allegedly caused the Plan ultimately to lose more than $1.6 million. J.A. 23.

Fairway and its officers, as the fiduciaries who appointed Dawson, also had the duty to monitor Dawson's performance. A. 30-31. Thus, they knew or should have known of Dawson's breaches. *Id.* However, without acknowledging or taking action to remedy Dawson's fiduciary breaches, Fairway removed Dawson as trustee of the Plan effective December 31, 1984. A. 30. After Dawson's removal as trustee, Lynn Keyser, counsel to Fairway, exercised authority over the Plan and its assets. *Id.* Then, effective February 1, 1985, Fairway appointed

Sovran trustee of the Plan, again without acknowledging any irregularities in Dawson's performance. *Id.*

Some of the imprudent investments that Dawson made for the Plan performed adequately for a time after Sovran's appointment as trustee. *Id.* Eventually, however, payments owed to the Plan under some of these investments ceased.[2] *Id.* In 1989, due to the losses caused by these investments, Fairway removed Sovran as trustee and appointed Chemung trustee of the Plan. *Id.*

As trustee of the Plan, Chemung filed an action against Sovran to recover the losses suffered by the Plan under Dawson's investments and two additional investments allegedly made by Sovran. *Id.* Chemung did not name Fairway or its officers as defendants, despite their failure to monitor Dawson, to correct his breaches, or to disclose his breaches to Sovran. J.A. 1-25. Instead, Chemung sought to collect only from Sovran the amounts lost by the Plan on Dawson's bad investments, notwithstanding the fact that Sovran, unlike Fairway and its officers, had neither the duty nor the opportunity as Dawson's successor to monitor or prevent his investments. *Id.* Under Chemung's theory, regardless of who was responsible for Dawson's fiduciary breaches, or the degree of culpability, Sovran and Sovran alone was required to bear all of the loss resulting from those breaches.

Sovran disagreed, filing a counterclaim against Chemung and a third party action against Fairway, three of

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[2] In 1986, the Department of Labor commenced an action against Dawson to recover losses incurred by 46 pension plans, including the Fairway Plan, caused by Dawson's breaches of fiduciary duty in connection with certain mortgage investments he made for the plans. *McLaughlin v. Dawson*, No. JFM 86-2536 (D. Md.). Thereafter, Dawson filed for bankruptcy. *In re Dawson*, No. 87-5-1372 (Bankr. D. Md.). The Plan received approximately $4,000 as its pro-rata share of the $70,000 the Department of Labor received in settlement of its action. Consent Order, *McLaughlin v. Dawson*, No. JFM 86-2536 (D. Md. Nov. 9, 1988). Under the Consent Order, Dawson was permanently enjoined from acting as a plan fiduciary. *Id.*

its officers, and Fairway's attorney for breach of their fiduciary duties to the Plan under ERISA, alleging, *inter alia*, that they had failed to monitor the activities of Sovran's predecessor, failed to correct his fiduciary breaches, and failed to disclose them to Sovran. A. 30-31.

The district court dismissed Sovran's counterclaim and third party complaint, holding that ERISA does not explicitly provide for contribution among fiduciaries and declining to recognize such a remedy under federal common law. A. 31. The United States Court of Appeals for the Second Circuit reversed. A. 27-41. Consistent with three decisions of this Court and decisions in eight other circuits, the court of appeals recognized that Congress explicitly instructed courts to develop federal common law under ERISA based on trust law and that contribution has been a part of trust law for more than a century.

SUMMARY OF ARGUMENT

The decision of the court of appeals recognizing a right of contribution among fiduciaries is consistent with this Court's recognition of the authority granted to federal courts to develop federal common law under ERISA based on trust law. No conflict arises as a result of the Second Circuit's decision because no court of appeals that has refused to recognize contribution applied the "federal common law" analysis used by the Second Circuit. Specifically, the Ninth Circuit, which has rejected contribution among ERISA fiduciaries, applied the *Cort v. Ash* test and determined there is no implied right of contribution under ERISA. The Second Circuit is in complete accord with that finding.

Finally, recognizing a right of contribution is fully in keeping with the purpose and goals of ERISA and will not undercut the legislative scheme embodied in ERISA. Accordingly, recognition of contribution among fiduciaries under federal common law raises no issue that requires the Court's intervention.

REASONS FOR DENYING THE WRIT

I. A FEDERAL COMMON LAW RULE OF CONTRIBUTION AMONG ERISA FIDUCIARIES IS CONSISTENT WITH THE PURPOSE OF THE STATUTE AND THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS RECOGNIZING THAT THE COURTS ARE TO DEVELOP A "FEDERAL COMMON LAW OF RIGHTS AND OBLIGATIONS UNDER ERISA-REGULATED PLANS."

The court of appeals based its decision to recognize a right of contribution among ERISA fiduciaries on well-settled principles of law. Nothing in the decision, and nothing in its result, warrants review by this Court.

The court of appeals' analysis of the issue is straightforward. Consistent with three decisions of this Court, its own precedent, and decisions of eight other circuits, the court of appeals began by recognizing that the courts are obliged to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Proceeding from this premise, the court of appeals, again consistent with extensive precedent confirming that ERISA is grounded in the law of private trusts, turned to traditional trust law for guidance in deciding whether to incorporate a right of contribution into the common law of ERISA. The court of appeals readily discerned that from the earliest days of the English chancery courts, and continuing today in the modern American law of private trusts, the equity courts have uniformly recognized that trust fiduciaries are entitled to seek contribution from their cofiduciaries who have jointly caused the trust to suffer a loss. The court of appeals therefore concluded that it is entirely consistent with the statutory design to permit an ERISA fiduciary accused of a breach of duty to seek contribution from other plan fiduciaries whose conduct contributed to the plan's loss.

The petitioners contend that the court of appeals misunderstood the Court's repeated observations in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Pilot Life Ins. Co.*, and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) that "the courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone Tire and Rubber Company*, 489 U.S. at 110 (quoting *Pilot Life Ins. Co.*, 481 U.S. at 56).[3] According to the petitioners, this statement means nothing more than that the federal courts are to apply the traditional common law tools of analysis to determine the meaning of the statute. It does not mean, the petitioners assert, that the federal courts are authorized in ERISA cases to act as traditional common law courts and fashion rules of law needed to resolve issues that the legislature has not addressed. Therefore, they conclude, the court of appeals exceeded its authority as a court of limited jurisdiction by adopting a rule not specifically delineated in ERISA. Petition ("Pet.") at 10-12, 24-25.

This argument ignores the premises of this Court's statements in *Firestone Tire and Rubber*, *Pilot Life*, and *Franchise Tax Board*.

It is, of course, elementary that the federal courts are courts of limited jurisdiction. As such, they ordinarily may do no more than apply federal law as enacted by Congress. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); *see United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). In some instances, however, this Court has concluded that in en-

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[3] In *Franchise Tax Board*, the Court observed that "* * * ERISA's legislative history indicates that, in light of the Act's virtually unique preemption provision, see § 514, 29 USC § 1144, 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.' 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)." 463 U.S. at 24 n.26.

acting a particular statute, Congress intended to confer on the federal courts the power to develop a body of federal common law consistent with federal policy expressed in the statutory scheme. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963). For example, this Court long ago decided that in granting to the federal courts exclusive power to adjudicate disputes over breaches of collective bargaining agreements under section 301(a) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 185(a), Congress intended that "* * * the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. at 96 n.35 ("In *Textile Workers v. Lincoln Mills*, * * * we concluded that § 301(a) supplied a basis for federal jurisdiction over certain cases and an authorization for judicial development of substantive federal law to govern those cases.").

It is against this background that this Court examined the role of the federal courts in adjudicating disputes arising under ERISA. In *Pilot Life*, a case involving the availability of state common law causes of action against an ERISA plan, the Court reviewed ERISA's legislative history and noted that the Conference Report on ERISA made clear in discussing the civil enforcement provisions of the statute that, "'[a]ll such actions . . . are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.'" *Pilot Life*, 481 U.S. at 55 (quoting H.R. Conf. Rep. No. 1280, p. 327 93d Cong., 2d Sess. (1974) (Court's emphasis deleted). Similarly, the Court noted that the principal majority and minority sponsors of the legislation made floor statements confirming that actions arising under ERISA "'will be

regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act' " and that " '[i]t is intended that a body of Federal substantive law will be developed by the courts to deal with rights and obligations under private welfare and pension plans.' " *Id.* at 56 (citations omitted). From this, the Court concluded that there was a clear expectation "* * * that a federal common law of rights and obligations under ERISA-regulated plans would develop * * *" *Id.*

As this Court's decisions recognize, the role of the federal courts in ERISA cases is not limited to statutory interpretation, as the petitioners contend. To the contrary, Congress plainly intended the courts to function in this arena in the same way that they have done for over 30 years under the LMRA—to develop federal common law "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Textile Workers Union*, 353 U.S. at 457.[4]

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[4] Consistent with this directive, the courts of appeals have repeatedly recognized their obligation to formulate rules of decision under federal common law to resolve issues for which ERISA contains no explicit statutory rule. *E.g., Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989) ("Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under section 301 of the LMRA."); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (recognizing a claim under general trust law principles for knowing participation in a fiduciary breach); *Plucinski v. I.A.M. Nat. Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989) ("Since Congress both authorized and expects that the courts will create a common law under ERISA, we need not look for a specific congressional intent to create the remedy at issue."); *Provident Life and Accident Insurance Co. v. Waller*, 906 F.2d 985, 993-94 (4th Cir.) (appropriate "to weave into the statutory fabric of ERISA the federal common law remedy of unjust enrichment"), *cert. denied*, 111 S. Ct. 512 (1990); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 972-73 (5th Cir. 1981) ("The legis-

The court of appeals was on equally solid ground when it turned to the law of private trusts for guidance in determining whether federal common law should incorporate a right of contribution among ERISA fiduciaries. This Court has made it abundantly clear that trust law is the appropriate guidepost for resolving issues on which ERISA is silent.

> ERISA abounds with the language and terminology of trust law. * * * ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, * * * "codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." * * * Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." * * * In determining the appropriate standard of review for actions under § 1132(a)(1)(B), *we are guided by principles of trust law.*

Firestone Tire & Rubber, 489 U.S. at 110 (citations omitted; emphasis added). *See Central States, Southeast*

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lative history of ERISA indicates that this section was intended to create a federal common law concerning pension rights, which would augment the rights created by ERISA's substantive provisions."); *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221, 236 (6th Cir.) (employer's claim for return of mistaken contributions arises under and is governed by federal common law), *cert. denied*, 479 U.S. 1007 (1986); *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.) (*en banc*) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits."), *cert. denied*, 111 S. Ct. 67 (1990); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) (relying on common law of trusts to uphold remedy of recision); *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1986) (acknowledging power to fashion federal common law but refusing to adopt a rule estopping the enforcement of the plan's terms "because ERISA expressly addresses the issue"); *but see Nieto v. Ecker*, 845 F.2d 868, 872 (9th Cir. 1988) (rejecting argument "that the common law of trusts supplies a federal cause of action where the statute itself provides none.")

& Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985) ("* * * rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-334 (1981) (Congress intended that union welfare funds regulated by the Taft-Hartley Act be operated under traditional trust law principles, and this desire became explicit in ERISA).

Mindful of this, the court of appeals examined the treatment of contribution claims under private trust law and found overwhelming authority for the proposition that a trust fiduciary is entitled to seek contribution from a cofiduciary who shares responsibility for a loss sustained by the trust. As the court of appeals put it,

> We must next determine whether traditional trust law provides for a right of contribution among defaulting fiduciaries. Indisputably, it does. Chemung and Fairway do not seriously contend to the contrary, nor could they, because the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine. *See* Restatement (Second) of Trusts § 258 (1959); Bogert, *The Law of Trusts and Trustees*, § 701 (2d ed. rev. 1982) (citing *Perry v. Knott*, 4 Beav. 179 (1842); *Sherman v. Parish*, 53 N.Y. 483 (1873)).

A. 35.

The petitioners are now in no better position to argue that a right of contribution is antithetical to the trust law principles embodied in ERISA than they were in the court of appeals. The principle of contribution is central to the law of equity, and has been so since the development of the concept of equity by the Roman courts. J. Pomeroy and S. Symons, II *Equity Jurisprudence* §§ 405

and 406 (5th ed. 1941); Halsbury, 38 *The Laws of England* ¶ 1829 (3d ed. 1962). The petitioners have offered no persuasive reason for this Court to depart from this bedrock principle of equity; nor have they advanced any reason for believing that Congress would have preferred a different result under the law of employee benefit trusts.

II. THERE IS NO SUBSTANTIAL CONFLICT AMONG THE CIRCUITS. THE COURTS OF APPEALS WHICH HAVE REJECTED CONTRIBUTION CLAIMS HAVE DONE SO ONLY BECAUSE THERE IS NO IMPLIED RIGHT OF CONTRIBUTION UNDER ERISA.

The petitioners contend that the decision below conflicts with decisions in other circuits, principally *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989) and *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989). The petitioners are mistaken. These cases decided nothing more than that a right of contribution among ERISA fiduciaries is not a statutorily "implied right of action" under the principles enunciated in *Cort v. Ash*, 422 U.S. 66 (1975). As the decision below recognized, the Ninth Circuit correctly resolved the issue presented to it. A. 34. But to say that ERISA contains no implied right of action for contribution under the *Cort v. Ash* test plainly does not answer the question of whether there should be a federal common law right of contribution under ERISA.

As this Court has made clear in at least two decisions, the question of whether there is a statutorily implied right of action for contribution is entirely distinct from the question of whether the federal courts, properly exercising federal common law powers in appropriate circumstances, should adopt a right of contribution. *Northwest Airlines*, 451 U.S. at 86; *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 638 (1981). Here, the court of appeals agreed that there is no statutorily implied right of action for contribution, but recognized that it should formulate a right of contribution as a matter of federal

common law. This decision is entirely consistent with this Court's precedent, and it is not in conflict with the *Call* decision.

At issue here are two seemingly related but quite different doctrines. In *Cort v. Ash*, this Court distilled from its earlier decisions a four factor test for determining when, as a matter of statutory construction, it is appropriate for the courts to find a private cause of action implied in a particular statutory scheme. The Court held that it is appropriate to imply a cause of action only if it can be determined that the party seeking the remedy is a member of the class for whose benefit the legislation was enacted, that Congress intended to create such a cause of action, that the remedy is consistent with the legislative scheme, and that the remedy is not one traditionally relegated to state law. 422 U.S. at 78. More recently, this Court has confirmed that the factors identified in *Cort v. Ash* apply equally to questions of statutory interpretation under ERISA. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) ("Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages * * *.")[5]

The federal common law doctrine, in contrast, is available in only two limited situations: where the courts in

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[5] Throughout their briefs, the petitioners suggest that the decision here is inherently inconsistent with this Court's decision in *Russell*. However, it is evident that *Russell* was concerned only with the question of whether a cause of action should be implied under section 409(a) of ERISA. 473 U.S. at 138 n.5; *id.* at 149 ("This case presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty.") (Brennan, J., concurring). Thus, unlike *Northwest Airlines* and *Texas Industries*, the Court was never presented with, and certainly did not reach, the question of federal common law.

the absence of legislation must "* * * fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States * * *," *Northwest Airlines*, 451 U.S. at 95; or under a few statutes where "* * * Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Texas Industries*, 451 U.S. at 642. As the Court's analyses in *Northwest Airlines* and *Texas Industries* make plain, the implied right of action and federal common law doctrines are "two quite different theories," *Northwest Airlines*, 451 U.S. at 86, and the outcome under one theory is not dispositive of the outcome under the other theory.

Despite this, the petitioners contend that the decision of the court of appeals conflicts with decisions in other circuits rejecting a right of contribution among ERISA fiduciaries. An examination of the cases that the petitioners rely on reveals that there is no substantial inter-circuit conflict.

The petitioners rely principally on two decisions of the Ninth Circuit, *Kim v. Fujikawa*, 871 F.2d 1427, and *Call v. Sumitomo Bank of California*, 881 F.2d 626. Both cases presented a single narow issue: whether section 409 of ERISA, 29 U.S.C. § 1109, can be interpreted to provide, by implication, a right of contribution among ERISA fiduciaries. In *Kim*, the court summarily rejected the claim, stating that

> * * * As the Supreme Court noted in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 141-42 (1984), section 409 of ERISA * * * only establishes remedies for the benefit of the *plan*. Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a *breaching fiduciary*. *See Call v. Sumitomo Bank*, 689 F. Supp. 1014, 1017-20 (N.D. Cal. 1988).

* * * *

> * * * we cannot agree with Fujikawa's contention that Congress implicitly intended to allow a cause of action for contribution under ERISA * * *.

Kim, 871 F.2d at 1432 (emphasis in original). Thus, as the petitioners appear to concede, Pet. at 6, *Kim* on its own plainly creates no conflict with the decision here. Indeed, the court of appeals has explicitly agreed that a right of contribution cannot be implied as a matter of statutory interpretation under the test set out in *Cort v. Ash*. A. 34.

The *Call* case likewise creates no conflict. Like *Kim*, the only issue presented on appeal in *Call* was whether there is a statutorily implied right of contribution under section 409(a) of ERISA.

> In their second cause of action, asserted by appellants in their capacity as fiduciaries, appellants sought contribution from all of the appellees in "an amount to be determined at the time of trial." *Appellants based this claim on ERISA § 409(a)*, 29 U.S.C. § 1109(a).

Call, 881 F.2d at 629 (emphasis added). The court of appeals rejected this argument explicitly on the ground that its earlier decision in *Kim* was a binding determination of the issue.

> * * * we are foreclosed from considering these arguments because they were rejected in our recent decision in *Kim* * * * In that case, we held that ERISA § 409, 29 U.S.C. § 1109, the provision upon which appellants in the instant case rely, "only establishes remedies for the benefit of the *plan*" and therefore "cannot be read as providing for an equitable remedy of contribution in favor of a *breaching* fiduciary."
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> * * * *
>
> The *Kim* opinion is unambiguous and undistinguishable. Because *Kim* governs this case, we affirm the district court's dismissal of appellants' contribution claim.

Call, 881 F.2d at 630-31 (emphasis in original; citations and footnote omitted).

It is readily apparent that *Call* does not conflict with the decision here. The *Call* court held only that as a matter of statutory interpretation, section 409(a) of ERISA cannot be read to imply a cause of action for contribution, a holding with which the court of appeals below agreed. A. 34. The appellants in *Call* did not argue, and the court of appeals did not address the separate question of whether the courts should adopt a right of contribution as a matter of federal common law under ERISA. *Call*, 881 F.2d at 629; *see Call v. Sumitomo Bank of California*, 689 F. Supp. 1014, 1022 (N.D. Cal. 1988) ("* * * under *Northwest Airlines*, this Court may not imply a right of contribution into ERISA.").

Two other decisions cited by the petitioners require only brief discussion. In *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), the court of appeals for the Seventh Circuit declined to fashion as a matter of federal common law a cause of action against a non-fiduciary for assisting in a violation of ERISA's reporting and disclosure requirements, concluding that such a claim would be inconsistent with explicit statutory policies. As such, the decision does not conflict in any way with the decision below or with settled principles governing the limits of the courts' authority to develop federal common law under a particular statutory scheme. *See Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 323 (1990) (in formulating maritime rules, the court "must * * * keep strictly within the limits imposed by Congress"). *Cf. Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.) (*en banc*) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits."), *cert. denied*, 111 S. Ct. 67 (1990).

In contrast, one district court in the Fourth Circuit has explicitly decided that it would not adopt a federal

common law of contribution among ERISA fiduciaries, reasoning that because Congress explicitly incorporated various principles of traditional trust law into the statute, it did not intend the courts to incorporate other trust principles as a matter of federal common law. *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 695-98 (D. Md. 1990). However, one month before *NARDA*, in a decision not cited by the district court, the Fourth Circuit adopted a federal common law rule of unjust enrichment, reasoning that such a rule furthered the policies expressed in the statute. *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985, 992-93 (4th Cir.), *cert. denied*, 111 S. Ct. 512 (1990). This lone trial court decision, which evidently does not reflect the law in the Fourth Circuit, does not present a substantial conflict that merits resolution by this Court.

III. RECOGNIZING A RIGHT OF CONTRIBUTION AMONG ERISA FIDUCIARIES IS CONSISTENT WITH THE STATUTE'S POLICY GOALS AND WILL SERVE TO FOSTER THE GROWTH AND DEVELOPMENT OF EMPLOYEE BENEFIT PLANS.

Contrary to petitioners' assertions, recognizing contribution among fiduciaries as a remedy under ERISA common law is entirely consistent with the statute's purpose. Congress enacted ERISA to "protect the interests of participants in employee benefit plans * * *," ERISA § 2(b), 29 U.S.C. § 1001(b), articulating minimum standards to "assur[e] the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). Thus, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and * * * provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). In specifying who is a fiduciary subject to these standards, Congress reached beyond mere titles, defining "fiduciary" as any individual

or institution exercising discretion or control over the managemnet of a plan or its assets. ERISA § 3(21), 29 U.S.C. § 1002(21). Recognizing contribution among this broad class of fiduciaries under ERISA furthers the goal of protecting the interests of participants and beneficiaries.

The availability of contribution among fiduciaries, for example, increases the likelihood that parties are brought into the action with a sufficient pool of resources to provide a full recovery to participants and beneficiaries. This is particularly important where a claim is asserted against one fiduciary and the fiduciary is unable to satisfy a judgment, in whole or in part. The ability to assert a contribution claim could also have the effect of extending the limitations period by permitting one fiduciary to seek contribution against another fiduciary even after a participant's claim is barred. Thus, contribution would generally make it easier for participants and beneficiaries to recover for fiduciary breaches.

The potential for liability to other fiduciaries serves as a stronger deterrent to fiduciary breach than the more limited risk of liability only to the plan. Without contribution, a breaching fiduciary is at risk only until another fiduciary reimburses the plan for a breach. With the possibility of an action for contribution, however, a fiduciary's potential liability is not extinguished by the plan's recovery from another fiduciary. This increased risk of liability increases a fiduciary's incentive to comply with ERISA's fiduciary standards.

Petitioners' own example illustrates the salutary effect the potential for contribution could have on a plan fiduciary's behavior. Petitioners explain that small employers may lack the expertise to comply with ERISA's technical requirements. Pet. at 13. Putting themselves in that class of small employers, petitioners apparently sought, by hiring Dawson and then Sovran, to relieve themselves of the duty to comply with ERISA's technical require-

ments. Pet. at 13. The specter of contribution, according to petitioners, would have a chilling effect on small employers, discouraging them from establishing ERISA plans. Pet. at 14. However, even hiring professional plan managers does not relieve an employer like Fairway of ERISA's very basic, non-technical duty to monitor fiduciaries hired to perform specific functions. If the threat of liability arising from potential contribution claims would have caused Fairway to take a harder look at the investments made by Dawson or to share with Sovran any doubts about Dawson's performance, such an effect promotes the purposes of ERISA.

The greater expense and effort for ERISA plaintiffs that petitioners foresee as a result of contribution among fiduciaries is similarly not a persuasive reason to omit this remedy. Pet. at 15. Petitioners' argument fails to acknowledge the multitudes who are already subject to suit under ERISA's broad, functional definition of "fiduciary." ERISA 3(21), 29 U.S.C. § 1002(21). Because Congress defined "fiduciary" for purposes of ERISA very broadly, most ERISA plaintiffs already name more than one party in their fiduciary breach actions. The incremental expense and effort that could result from cross-claims and third party claims among fiduciaries would hardly deter a plaintiff.

Permitting claims for contribution will also help to ensure an adequate pool of qualified institutions and individuals willing to serve as fiduciaries, and equally important, willing to serve at a reasonable cost to the plan. Fiduciaries commit breaches for reasons ranging from negligence or ignorance to affirmative criminal intent. Regardless of the reason for a breach, ERISA makes all breaching fiduciaries strictly liable to the plan for losses stemming from the breach. If, however, fiduciaries are prohibited from allocating among themselves the cost of the breach in accordance with their culpability, some individuals and institutions will be reluctant to undertake the role of fiduciary.

At bottom, petitioners' policy arguments against contribution fail to recognize three fundamental propositions. First, Congress made it plain that it intended to confer on the courts the power to establish a federal common law of employee benefit plans. Congress made it equally plain that the common law of ERISA should find its source in traditional trust law. Finally, from the earliest days, traditional trust law incorporated concepts of contribution and indemnity among trust fiduciaries. It follows that there is no justification whatsoever for denying fiduciaries of employee benefit plans the right to seek contribution and indemnity from their co-fiduciaries. To rule otherwise serves no purpose except to insulate some fiduciaries from the consequences of their misconduct.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Nos. 91-680 and 91-681

In the Supreme Court of the United States

OCTOBER TERM, 1991

FAIRWAY SPRING CO., INC., ET AL., PETITIONERS

v.

SOVRAN BANK/MARYLAND

CHEMUNG CANAL TRUST COMPANY, ETC., PETITIONER

v.

SOVRAN BANK/MARYLAND

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal courts, in developing a federal common law under the Employee Retirement Income Security Act (ERISA), may recognize claims for contribution or indemnity among fiduciaries.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-680

FAIRWAY SPRING CO., INC., ET AL., PETITIONERS

v.

SOVRAN BANK/MARYLAND

No. 91-681

CHEMUNG CANAL TRUST COMPANY, ETC., PETITIONER

v.

SOVRAN BANK/MARYLAND

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1981, petitioner Fairway Spring Company, Inc., established an employee retirement plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Acting through its officers,[1] Fairway appointed Glen Dawson as plan trustee.

[1] Theodore Paterson, Donald R. Peterson, and Dorothy Tarby, who are officers and directors of Fairway, and Lynn Keyser, the

Pet. App. A29-A30. Between 1982 and December 1, 1984, when he was removed, Dawson made various imprudent investments and engaged in transactions prohibited under ERISA's fiduciary standards. In the wake of Dawson's departure, his investments initially continued to yield income, but payments from certain of his investments eventually ceased, resulting in losses to the plan. *Id.* at A30; 91-680 Pet. 2-3.

After Dawson's removal, petitioner Lynn Keyser, the plan's attorney, exercised fiduciary authority over the plan for two months. On February 1, 1985, respondent Sovran Bank/Maryland was appointed trustee. Pet. App. A30. In 1989, Fairway removed Sovran and appointed Chemung Canal Trust Company, petitioner in No. 91-681, as plan trustee. *Id.* at A30.

2. In an effort to recover plan losses, Chemung brought this action under Section 502 of ERISA (29 U.S.C. 1132) against respondent Sovran Bank, in its capacity as former trustee. The complaint alleged that Sovran had breached its fiduciary duty to the plan by failing to discover and rectify Dawson's imprudent investments; by failing to bring timely actions against Dawson and the fidelity bond and insurance companies that had issued policies covering the losses [2]; and by making two unsound investments during its tenure as trustee. Plaintiffs sought over $1.5 million in damages plus interest from Sovran. Pet. App. A29; 91-680 Pet. 3.[3]

Sovran filed a counterclaim against Chemung, asserting that Chemung contributed to the plan's losses by failing

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Fairway pension plan's attorney, are petitioners in No. 91-680. Chemung Canal Trust Co., petitioner in No. 91-681, is presently trustee of the plan.

[2] In 1986, the Department of Labor sued Dawson to recover losses to 46 pension plans, including Fairway's. Br. in Opp. 3 n.2. Dawson filed for bankruptcy and the Fairway plan recovered $4,000 as its pro-rata share under the consent order. *Ibid.*

[3] Two plan beneficiaries were also plaintiffs in Chemung's suit. See Pet. App. A16. They did not participate in the court of appeals and are not parties in this Court.

to evaluate and pursue the pertinent claims. Pet. App. A16. Sovran sought relief on behalf of the plan, as well as contribution or indemnity for its own potential liability. *Id.* at A16, A31. Sovran also filed a third-party complaint against Fairway, its officers, and its counsel, claiming that they had breached their fiduciary duties under ERISA because they had not monitored and corrected Dawson's breaches or disclosed them to Sovran. *Id.* at A16, A30. Accordingly, Sovran requested contribution or indemnity from the Fairway third-party defendants. *Id.* at A16, A31.

3. The district court dismissed Sovran's counterclaim and its third-party complaint. Pet. App. A15-A23. First, the court held that Sovran—as a former fiduciary—did not have standing to bring a counterclaim on behalf of the plan. *Id.* at A17-A18. Second, the court concluded that ERISA did not allow claims for contribution or indemnity among fiduciaries. The court concluded that a right of contribution was unavailable because it was not implied in the statute and did not arise from federal common law. *Id.* at A18-A23. The court determined that the indicia of an implied cause of action were absent from the statutory scheme. Moreover, while acknowledging that ERISA authorizes courts to develop a substantive federal common law of rights and obligations, the court found that the integrated and comprehensive nature of the statute's remedial scheme counseled against adding further remedies to its enforcement provisions. *Id.* at A21-A22.

4. The court of appeals reversed and remanded with respect to Sovran's claims for contribution and indemnity.[4] Pet. App. A33-A40. The court concluded that the analytical framework for deriving implied rights of action was inapposite because the question before it involved the allocation of responsibility among defendants rather than the plaintiff's right to relief. *Id.* at A34. Instead,

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[4] The court of appeals affirmed the district court's holding that a former fiduciary has no standing to sue on behalf of the plan under Section 502(a) of ERISA, 29 U.S.C. 1132(a). Pet. App. A31-A33.

the court determined that Congress had directed the courts to develop a federal common law using traditional principles of trust law, and that a right of contribution among co-trustees was "an integral and universally-recognized part of trust doctrine." *Id.* at A35. The court further determined that the common law rule was consistent with ERISA: the rule would have "no financial impact" on the recovery of plan beneficiaries, who would be able to recover fully from any breaching fiduciary under a theory of joint and several liability (*id.* at A36); and any increase in the complexity of ERISA fiduciary litigation would be justified by the need to protect a fiduciary from bearing the full weight of a loss for which it was only partially responsible. *Ibid.* Thus, the court found that fiduciaries are entitled to assert the traditional trust law right of contribution under the common law of ERISA. *Ibid.*[5]

DISCUSSION

In our view, the court of appeals correctly determined that ERISA authorizes federal courts to apply the equitable doctrines of contribution and indemnity in apportioning liability among plan fiduciaries. This Court's precedents establish that ERISA requires courts to develop a federal common law governing fiduciary rights and obligations using traditional trust principles. The right of contribution among fiduciaries is a well established feature of the common law of trusts, and nothing in ERISA compels a departure from that rule.

Although the issue is important, we do not believe that further review is warranted at this time. Nine of the circuits have had no occasion to address this issue in the 18 years since ERISA was adopted. Moreover, the Ninth

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[5] Judge Altimari dissented. Pet. App. A40-A41. Although he believed the majority's holding made "good sense," *id.* at A40, Judge Altimari reasoned that Congress was aware that the issue of contribution or indemnification would arise under ERISA, and that Congress's omission of express contribution remedies for fiduciaries demonstrated that such rights had been rejected. *Id.* at A41.

Circuit—the only circuit to reject a right of contribution —has never directly addressed the merits of arguments that the Second Circuit found dispositive of the issue. We do not believe review by this Court is needed unless and until it becomes apparent that the courts of appeals cannot reach a consensus on the issue.

1. ERISA § 404 provides, in relevant part, that a fiduciary of an ERISA-regulated plan must "discharge his duties with respect to a plan * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Under ERISA § 409, moreover, a fiduciary who breaches the duties imposed by subchapter I, 29 U.S.C. 1001-1168, "shall be personally liable to make good to [an ERISA] plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. 1109(a). Section 409(a) also subjects a breaching fiduciary "to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a).

ERISA § 502(a), 29 U.S.C. 1132(a), provides a mechanism for certain parties to seek redress for any breach of the fiduciary duties imposed by ERISA. Specifically, Section 502(a)(2) authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [ERISA § 409]." 29 U.S.C. 1132(a)(2). More generally, a breach of fiduciary duty is cognizable under Section 502(a)(3), which authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter [protection of employee benefit rights] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the

terms of the plan." 29 U.S.C. 1132(a)(3). Finally, under Section 502(a)(5), the Secretary of Labor enjoys similar authority to bring a civil action to obtain "appropriate equitable relief" to enforce ERISA's employee benefit protections and to redress violations of the statute. 29 U.S.C. 1132(a)(5). Section 502(e), 29 U.S.C. 1132(e), vests federal courts with jurisdiction to entertain any "civil action" brought by these parties under ERISA.

Although the statute includes detailed provisions concerning the rights of these parties to sue fiduciaries to recover losses to beneficiaries and the plan, the statute does not address rights of other parties to sue fiduciaries or make any express provision for assertion of claims among fiduciaries responsible for plan losses.[6] This Court has made clear, however, that a right of contribution can properly be recognized in the absence of express statutory authority if Congress either intended to create that right by implication, or if it authorized the courts to derive such a right as a rule of federal common law. See *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 90 (1981); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). We share the court of appeals' view that Congress did authorize federal courts to determine whether a right of contribution should be recognized under the common law of ERISA, and that the equitable doctrine of contribution should properly form a part of that common law. Pet. App. A34-A40.

2. a. There can be no question that adjudication of a breach of fiduciary duty claim under ERISA requires resort to a federal common law of trusts. As this Court has

[6] At common law, breaching co-trustees were generally liable for contribution from each other, but if one trustee was substantially more at fault than the other, received a benefit from the breach, or acted in bad faith, then the other trustee could obtain indemnity. See Restatement (Second) of Trusts § 258 (1959). For purposes of simplicity, we use the term "contribution" to refer to contribution or indemnity.

explained, "ERISA abounds with the language and terminology of trust law," *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), and ERISA's "fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" 489 U.S. at 110 (quoting H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)). Accordingly, this Court has recognized that ERISA authorizes courts "to develop a 'federal common law of rights and obligations under ERISA-regulated plans,'" 489 U.S. at 110 (quoting *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987)), and that traditional principles of trust law are to be consulted in deriving federal common law under ERISA, see, *e.g.*, 489 U.S. at 111-115; *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

This Court has already determined that ERISA's authorization to develop federal common law rules is not limited to the substantive rights and obligations of ERISA plan fiduciaries, but also extends to the remedial provisions of ERISA. In *Firestone*, 489 U.S. at 108-115, the Court considered the appropriate standard of judicial review governing challenges to a plan's denial of benefits brought in actions under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B). Even though ERISA contains "a panoply of remedial devices" and represents a "comprehensive and reticulated statute," the Court concluded that Congress had not addressed all issues arising under that remedial scheme, but had instead delegated common law authority to the courts to answer unresolved questions. 489 U.S. at 108-111 (citation omitted). Thus, instead of resorting to the usual principles of statutory interpretation that ordinarily govern such questions, the Court examined established principles of trust law, and created a federal common law rule defining the scope of the remedy. *Firestone*, 489 U.S. at 111-115.

Similarly, congressional silence on the issue of contribution requires resort to common law principles under

ERISA. No part of Section 502(a) explicitly addresses the manner in which liability is to be enforced when more than one fiduciary is responsible for a single breach. Nor is that issue mentioned in ERISA § 405(a), 29 U.S.C. 1105(a),[7] the provision prescribing the conditions under which one fiduciary may be liable for another's breach. Section 405 merely states that one fiduciary "shall be liable" for the breach of another in some circumstances, but it says nothing about how liability is to be allocated, if at all, among the fiduciaries who are liable for the same breach. No statutory provision specifies that fiduciaries who share responsibility for a joint breach shall be jointly and severally liable. Nor does anything in the text even speak to whether a plaintiff would be limited to a single recovery, as opposed to being able to execute the same judgment against all fiduciaries liable for the

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[7] Section 405(a), 29 U.S.C. 1105(a), provides:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with [ERISA § 404(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 405(c), 29 U.S.C. 1105(c), provides that the plan may allocate certain responsibilities among fiduciaries, and that a fiduciary whose duty is allocated to another person is not liable for that person's breach of duty, unless the allocation of duty itself involves a breach of fiduciary duty. That provision, however, does not speak to the division of liability when multiple fiduciaries are liable for the same unallocated duty.

same breach.[8] Of particular relevance here, ERISA nowhere addresses whether a fiduciary must bear the entire burden of a jointly inflicted loss, or if he may instead seek an equitable allocation of that loss through a right of contribution. As in *Firestone*, the statute has left a remedial gap to be filled through the development of federal common law rules.[9]

b. The federal common law under ERISA should properly incorporate the equitable doctrine of contribution. First, the "established principles of trust law," *Firestone*, 489 U.S. at 115, and "the common law of trusts," *Central States*, 472 U.S. at 570, strongly support this conclusion. Under the common law of trusts, multiple trustees who jointly commit a breach of fiduciary duty, and trustees liable for the breach of another, are subject to joint and

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[8] Nevertheless, courts have held that ERISA imposes joint and several liability on fiduciaries, see, *e.g.*, *Kay* v. *Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*, 780 F. Supp. 1447, 1461 (E.D. Pa. 1991); *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 644 (W.D. Wis. 1979), and that plaintiffs are limited to a single satisfaction of a judgment for their losses, see *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1030-1031 (2d Cir. 1992).

[9] For other decisions fashioning remedies where ERISA's remedial scheme is silent on the availability of the remedy in question, see, *e.g.*, *PM Group Life Insurance Co.* v. *Western Growers Assurance Trust*, 953 F.2d 543, 546-547 (9th Cir. 1992) (adopting federal common law rule to coordinate benefits between two ERISA-regulated health benefits plans); *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179, 1186 (3d Cir. 1991) (in suit against fund for recovery of benefits, authorizing fund and administrator to bring cross-claim seeking restitution of benefits paid to the wrong claimant); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2d Cir. 1987) (piercing the corporate veil); *Donovan* v. *Mazzola*, 716 F.2d 1226, 1235-1236 (9th Cir. 1983) (relying on common law trust remedies to uphold order requiring fiduciaries to post bond for potential future losses resulting from a breach of fiduciary duty), cert. denied, 464 U.S. 1040 (1984).

several liability. See, *e.g.*, Restatement (Second) of Trusts § 224 cmt. a (1959); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 701, at 195-196 (rev. 2d. ed. 1982), 3A A. Scott & W. Fratcher, *The Law of Trusts* § 258, at 399 (4th ed. 1988).[10] But when the rules of joint and several liability result in a trustee's paying a disproportionate share of damages arising out of a breach, that trustee may in appropriate circumstances seek contribution or indemnity from other fiduciaries under equitable principles. See, *e.g.*, Restatement (Second) of Trusts, *supra*, § 258; G. Bogert & G. Bogert, *supra*, § 701, at 196-197; 3A A. Scott & W. Fratcher, *supra*, §§ 258-258.2, at 399-405. Otherwise, a trustee who was merely negligent in failing to protect beneficial interests would be required to bear full responsibility for losses even where another trustee caused the losses through intentional wrongdoing. See note 14, *infra*.

Second, adhering to the traditional trust law rule of contribution is consistent with "the policy of the legislation." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957).[11] ERISA protects plan partici-

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[10] This Court has repeatedly consulted the sources cited in text in fashioning federal common law rules under ERISA. See, *e.g.*, *Firestone*, 489 U.S. at 111-112, 115; *Central States*, 472 U.S. at 570 n.11.

[11] The Fairway petitioners claim that recognizing a right of contribution would disserve ERISA's objectives by (1) deterring entities from assuming the role of fiduciary, and (2) increasing the complexity and cost of litigation. 91-680 Pet. 12-18. Neither concern justifies departing from the traditional rule. First, a fiduciary is exposed to personal liability under ERISA, 29 U.S.C. 1109(a), irrespective of any right of contribution. While a fiduciary confronts more potential claimants if a right of contribution is permitted, the fiduciary also may be able to shift liability to culpable co-fiduciaries. Second, any problems associated with greater complexity in litigation may be mitigated by the court's authority to sever third-party claims for contribution or indemnity. Fed. R. Civ. P. 14(a). In deciding a Rule 14 motion, "the court typically is

pants and beneficiaries by establishing standards of fiduciary conduct and supplying appropriate remedies and sanctions for their breach. 29 U.S.C. 1001(b). Because of joint and several liability, a right of contribution will have "no financial impact on the recovery of plaintiffs," who may obtain full recovery from "any or all of the breaching fiduciaries." Pet. App. A36; see *Free* v. *Briody*, 732 F.2d 1331, 1338 (7th Cir. 1984). At the same time, such a remedy may, in many cases, assist plaintiffs in proving their case by giving defendant fiduciaries an incentive to establish the fault of co-fiduciaries who participated in a breach. In addition, a fiduciary who can seek contribution may be more willing to settle a meritorious claim and reimburse the plan for its losses.[12] Finally, because a plaintiff may, for a va-

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concerned with the effect the additional parties and claims will have on the adjudication of the main action—in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." 6 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1460, at 457 (2d ed. 1990). District courts possess like authority relative to counterclaims. Fed. R. Civ. P. 42(b). In any case, this Court in *Firestone*, 489 U.S. at 115, rejected the asserted potential for increased litigation as a basis for departing from traditional trust law.

[12] It has been suggested that a defendant may be more inclined to settle a lawsuit if the defendant confronts the entire damages award. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156, 1161 (1941). However, a plaintiff's ability to coerce "a still-unproved tortfeasor into a favorable settlement by threatening to sue him alone" does not appear to be a legitimate basis for opposing the availability of contribution. Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170, 1172 (1941). It has also been suggested that a rule of contribution may deter a defendant from settling if the settlement does not protect him from a subsequent lawsuit seeking contribution. James, 54 Harv. L. Rev. at 1161. But a court of equity can address that concern by adopting rules under which a settlement may, in some circumstances, bar a later claim for contribution, with an appropriate adjustment in the liability of nonsettling defendants. See *In re Masters Mates & Pilots Pension*

riety of reasons, choose to sue fewer than all of the potential wrongdoers,[13] a right of contribution may be the only means of ensuring that the least culpable fiduciary does not bear the entire burden of liability while the most culpable fiduciary does not bear any. See W. Prosser & W. Keeton, *The Law of Torts* § 50, at 337-338 (5th ed. 1984).[14]

3. a. Petitioners err in contending, 91-680 Pet. 8-12, that the decision below conflicts with this Court's decisions rejecting a federal common law right of contribution under other statutes, namely Title VII and the Equal Pay Act, see *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, and the antitrust laws, see *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, *supra*. In fact, the reasoning of those decisions supports the court of appeals' holding in this case.

Both decisions rested upon the conclusion that federal courts lack general authority to fashion rules of federal

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Plan and IRAP Litigation, 957 F.2d 1020, 1028-1032 (2d Cir. 1992). The availability and scope of such a remedy under ERISA § 502 is not before this Court.

[13] For example, if the facts alleged by Sovran are true, Fairway is primarily responsible for failing to discover and remedy the breaches occurring before Sovran's appointment as trustee. Yet the current trustee, Chemung, has sued Sovran (the trustee that it replaced), rather than Fairway (the fiduciary that selected Chemung to replace Sovran).

[14] When a defendant seeks contribution in the case of an intentional tort, it is appropriate to deny that individual relief from his own deliberate wrong. But there is an "obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the other goes scot free." W. Prosser & W. Keeton, *supra*, § 50, at 337-338. Consistent with that view, traditional trust law limits the right of contribution to those trustees who have not breached their fiduciary duty in bad faith. See, *e.g.*, Restatement (Second) of Trusts, *supra*, § 258.

common law, and that no authority to fashion a federal common law rule of contribution existed under Title VII or the Equal Pay Act, *Northwest Airlines*, 451 U.S. at 95, 97-98, or under the antitrust laws, *Texas Industries*, 451 U.S. at 640, 643-646. But the Court was careful to emphasize that there are areas in which federal courts possess authority to create governing rules of federal common law. For example, the Court cited general admiralty jurisdiction as a source of federal common law authority, noting that *Cooper Stevedoring*, *supra*, had relied on "traditional admiralty doctrine" to find a federal common law right of contribution among joint tortfeasors. *Northwest Airlines*, 451 U.S. at 95-97; see *Texas Industries*, 451 U.S. at 641-642. The Court also noted that LMRA § 301 presents an "analogous situation" to that of admiralty, because Congress supplied federal jurisdiction and the authority to create judge-made federal rules of decision under the LMRA. *Northwest Airlines*, 451 U.S. at 96 n.35; see *Texas Industries*, 451 U.S. at 642-643 (Section 301 "not only * * * grant[s] jurisdiction over defined areas of labor law but also * * * vest[s] in the courts the power to develop a common law of labor-management relations").

Because ERISA supplies courts with federal common law rule making power to give content to the broad remedial provisions of Section 502(a), *Firestone*, 489 U.S. at 110-114, this case is governed by the same principles that apply in the admiralty and LMRA contexts. Indeed, Congress explicitly patterned Section 502(a) of ERISA after Section 301 of the LMRA (29 U.S.C. 186). See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) ("All * * * actions [under Section 502(a)] * * * are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."); 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams) (same). This Court has confirmed, moreover, that ERISA § 502 is comparable to LMRA § 301 in

that it broadly preempts state law remedies, with the expectation that courts will develop a federal common law to provide uniform rules of decision. *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54-56 (1987); see *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 485-486 (1990).[15]

Thus, the court of appeals in this case was justified in adopting a right of contribution under Section 502 of ERISA. Just as this Court in *Cooper Stevedoring*, 417 U.S. at 110, properly crafted a federal common law right of contribution based on "traditional admiralty doctrine," *Northwest Airlines*, 451 U.S. at 97, the court below appropriately consulted "traditional trust law" to fashion a federal common law right of contribution under ERISA. Pet. App. A35. In addition, this Court has adopted federal common law rules to apportion liability between wrongdoers under LMRA § 301. See, *e.g.*, *Bowen* v. *United States Postal Service*, 459 U.S. 212, 224-228 (1983); *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967); see also *Rozay's Transfer* v. *Local Freight Drivers, Local 208*, 850 F.2d 1321, 1334-1335 (9th Cir. 1988) (right of indemnification under LMRA § 301), cert. denied, 490 U.S. 1030 (1989).[16] In view of the similarity of the

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[15] Petitioners argue that ERISA provides only "interpretive" common law authority, and not the authority to fashion rights and obligations. 91-680 Pet. 9. However, this Court has made clear that admiralty jurisdiction grants the federal judiciary authority "to fashion rules of law" and that Section 301 of the LMRA presents an "analogous situation." *Northwest Airlines*, 451 U.S. at 96-97 & n.35. Because ERISA § 502(a) was patterned after LMRA § 301, *Pilot Life*, 481 U.S. at 56, petitioners' contention is misplaced.

[16] It is true that the Court in *Texas Industries* noted a similarity between Section 301 of the LMRA and the "sweeping language" of the substantive provisions of the Sherman Act, 15 U.S.C. 1, 2; 451 U.S. at 642-643, but then found no authority to fashion a right of contribution under the "detailed and specific" remedial provisions of the antitrust laws. *Id.* at 643-646. In contrast, this Court has made clear that the open-ended remedial provisions of Section 502(a) are to be given content using federal common law. *Firestone*, 489 U.S. at 110-111.

grant of federal common law making authority under ERISA, *Texas Industries* and *Northwest Airlines* present no impediment to the court of appeals' decision in this case.

b. Contrary to petitioners' contention, 91-680 Pet. 19-20; 91-681 Pet. 6, the court of appeals' ruling is consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). In *Russell*, a beneficiary sued a plan fiduciary for bad-faith processing of his claim for benefits, asserting a right to recover compensatory and punitive damages not available under the terms of the plan. Section 502(a)(1)(B), however, explicitly authorizes a beneficiary who has wrongfully been denied benefits to bring a claim "to recover benefits due to him *under the terms of his plan*." 29 U.S.C. 1132(a)(1)(B). The claim asserted by the beneficiary accordingly went beyond the congressional description of the beneficiaries' remedy (473 U.S. at 144), and the Court in *Russell* was asked to decide whether the apparent limitations on the remedy set forth in that Section could be avoided by permitting the claim to proceed under ERISA § 502(a)(2), which permits a beneficiary to sue a fiduciary for breaches of fiduciary duty under Section 409.

The Court declined to read Section 409 as enlarging the beneficiary's "explicitly authoriz[ed]" (473 U.S. at 144) right to recovery for wrongful denial of benefits. Instead, the Court interpreted Section 409—which provides that a fiduciary "with respect to [an ERISA] plan" is personally liable to "make good to such plan any losses to the plan" resulting from a breach of the fiduciary's duties—to require that damages under Section 409 "inure[] to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. Although Section 409 authorizes a court to award "such other equitable or remedial relief as the court may deem appropriate," 29 U.S.C. 1109(a), the Court concluded that this language only authorized " 'plan-related' relief," and did not permit a beneficiary to seek

extracontractual damages in his personal capacity. 473 U.S. at 142.[17]

Nothing in *Russell* forecloses the court of appeals' decision here. First, the court of appeals' derivation of a federal common law right of contribution among fiduciaries, Pet. App. A35-A40, does not conflict with *Russell*'s holding that the broad equitable provisions of Sections 409 and 502(a)(2) are limited to "'plan-related' relief," 473 U.S. at 142. This civil action arises out of a claim properly brought under Section 502(a)(2) on behalf of an ERISA plan based on a breach of fiduciary duty. Thus, unlike *Russell*, the question is not whether the action is within the scope of Sections 409 and 502(a)(2), but whether the court may, in fashioning "appropriate" relief, shape the award under Sections 409 and 502 to apportion damages equitably by recognizing a right of contribution.[18] In light of traditional trust principles, and

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[17] The Court also rejected the argument that ERISA authorized an implied right of action for extracontractual damages, reasoning that the comprehensive nature of the remedial scheme made it unlikely that Congress intended to imply remedies that it did not include expressly. 473 U.S. at 145-148.

[18] This case does not present the distinct question whether a fiduciary may bring an independent lawsuit seeking contribution under Section 502(a)(3), 29 U.S.C. 1132(a)(3). Respondent is a former fiduciary; hence, it is unclear whether respondent would be able to invoke the jurisdiction of the district court under Section 502(e). See *Franchise Tax Board* v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 21 (1983) ("The express grant of jurisdiction in ERISA is limited to suits brought by certain parties."); 29 U.S.C. 1132(a) (specifying only the Secretary of Labor, participants, beneficiaries, and fiduciaries among the parties who may sue under Section 502). However, even if respondent were unable to bring an independent lawsuit, that fact would not affect the district court's ability to entertain a third-party claim as part of a proper lawsuit against it under Sections 409 and 502 of ERISA. Cf. *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179, 1186 (3d Cir. 1991) (in beneficiary's action for benefits under Section 502(a)(1)(B), fund and administrator may assert cross-claim for restitution against second beneficiary who wrongly received benefits, even though Section 502(a)(1)(B) authorizes only participants and beneficiaries to sue). If

the broad federal common law rule making authority under Section 502(a), contribution assuredly constitutes "appropriate" relief, whether the underlying action is brought under Sections 409 and 502(a)(2) or under Sections 502(a)(3) or 502(a)(5).

Second, resort to common law may not have been appropriate in *Russell* because Congress "explicitly" addressed the scope of the beneficiary's rights to recovery for wrongful denial of benefit claims in Section 502(a)(1)(B). In contrast, no section of ERISA expressly addresses the rights of fiduciaries for apportionment of liability among themselves. This case is therefore not controlled by *Russell*; rather, it is controlled by *Firestone*—which requires resort to common law doctrine where Congress simply did not address a remedial issue.

4. a. Although there is disagreement among the circuits concerning the existence of a fiduciary's right to contribution under ERISA, we do not believe that there is a conflict warranting this Court's review. Only three circuits have squarely addressed the issue presented by the petition, and it is not clear that the law has been settled even in those circuits. The Seventh Circuit has held that a right of contribution or indemnity among fiduciaries is available under ERISA. *Free* v. *Briody*,

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the district court has jurisdiction over a "civil action" under Section 502(e), 29 U.S.C. 1132(e), it also has jurisdiction to consider third-party claims for contribution under 28 U.S.C. 1367(a), which provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder * * * of additional parties.

And if federal common law supplies a right of contribution, then Rule 14(a), Fed. R. Civ. P., provides a procedural mechanism for impleading co-fiduciaries as third-party defendants.

732 F.2d 1331, 1337 (1984); see *Alton Memorial Hospital* v. *Metropolitan Life Insurance Co.*, 656 F.2d 245, 250 (7th Cir. 1981) (dictum). However, subsequent cases in the Seventh Circuit have characterized the pronouncements of *Free* and *Alton* as dictum, and have treated the issue of contribution under ERISA as unsettled.[19]

Although the Ninth Circuit has rejected a right of contribution under ERISA, see *Kim* v. *Fujikawa*, 871 F.2d 1427 (1989); *Call* v. *Sumitomo Bank*, 881 F.2d 626 (1989), it did so without explicitly discussing whether the common law grounds for relief relied upon by the Second Circuit created a right of contribution. In *Kim*, the court determined that Congress did not intend to imply a private right of action for contribution, but did not decide whether such a right could be derived as a rule of federal common law under ERISA's broad remedial provisions. In *Call*, the Department of Labor filed a brief as amicus curiae arguing that the Ninth Circuit should recognize a right to contribution based on federal common law. See Pet. App. A53-A63. Although the court of appeals deemed those arguments "persuasive," it concluded that the decision in *Kim* foreclosed reconsideration of the issue of contribution. 881 F.2d at 630-631.[20] The Ninth Circuit

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[19] See *Lumpkin* v. *Envirodyne Industries, Inc.*, 933 F.2d 449, 464 n.10 (7th Cir.), cert. denied, 112 S. Ct. 373 (1991); *Donovan* v. *Robbins*, 752 F.2d 1170, 1178 (7th Cir. 1985) (assuming without deciding that the "dicta" in *Free* and *Alton* are correct); *Mutual Life Insurance Co.* v. *Yampol*, 706 F. Supp. 596, 599-600 (N.D. Ill. 1989) (declining to follow *Free* and *Alton* on the ground that this Court's later decision in *Russell* undercut their rationale). In reserving the question whether ERISA authorizes a right of indemnification between a trustee and a nonfiduciary, the Fifth Circuit approvingly made passing reference to *Free*'s holding in *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (1988), cert. denied, 490 U.S. 1089 (1989). The Fifth Circuit, however, has never squarely addressed whether a fiduciary has a right of contribution or indemnity under ERISA. See *Schloegel* v. *Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991) (declining to follow the dicta in *Lindemann*).

[20] The court in *Call* acknowledged that ERISA authorizes the development of a federal common law of trusts, 881 F.2d at 631-632,

has accordingly never issued a definitive ruling on the merits of the argument adopted by the Second Circuit.[21] None of the other nine circuits has squarely addressed the issue.

Further, the question whether Section 502 of ERISA authorizes courts to fashion a federal common law right of contribution is a complex one, and this history reflects the fact that there has not yet been a thorough examination of the issue in the lower federal courts. The decision of the Second Circuit here in fact represents the first time a court of appeals has explicitly addressed whether a federal common law right of contribution is consistent with this Court's decision in *Russell* (which was decided after *Free*). The court of appeals' careful analysis of the federal common law issue may well bring the question into sharper focus in the lower courts and provide the basis for a consensus to develop.

b. The contribution issue is important to the implementation of ERISA, but the interests of ERISA litigants do not require immediate resolution of the issue by this Court. The interests of ERISA beneficiaries and participants are protected because plaintiffs may continue to recover a plan's losses "from any or all breaching fiduciaries, each of whom would be jointly and severally liable," Pet. App. A36, and any increased complexity of litigation may be mitigated by various procedures allowed under the Federal Rules of Civil Procedure. See note 11, *supra*.

The practical impact of the present decision upon fiduciaries also does not warrant immediate review. The court merely recognized a right of contribution; it neither

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but because the court believed itself bound by *Kim*, it never directly addressed the argument in favor of recognizing a federal common law right of contribution under ERISA.

[21] Given *Call*'s apparent approval of the Secretary's arguments and the fact that there is now a conflict between *Call* and the decision in this case, the Ninth Circuit may find it appropriate to consider this issue en banc if it arises again in that circuit. See 9th Cir. R. 35-1 (citing inter-circuit conflict as a basis for en banc review).

defined the scope of that right, nor held petitioners liable for contribution. Because the court of appeals has remanded the case for trial, it is unclear whether petitioners will ever have to satisfy a contribution or indemnity judgment. If they do not prevail on remand, a trial and any subsequent appeal in this case will presumably shed light on the practical concerns that inform the question whether to recognize a federal common law right of contribution under ERISA. See pp. 10-12, *supra*. Accordingly, the interlocutory posture of this case also counsels against further review at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-680

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In The

Supreme Court of the United States

October Term, 1992

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

PETITONERS REPLY TO THE BRIEF OF THE UNITED STATES

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No. 91-680

In the
SUPREME COURT OF THE UNITED STATES

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice president and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES

In response to the Court's invitation to comment on Fairway's petition for a Writ of Certiorari, the government has now submitted a Brief expressing the view that the issue raised by the Petition "is important" (U.S. Br. 4) and "there is disagreement among the circuits concerning the existence of a fiduciary's right to contribution under ERISA" (U.S. Br. 17). One might expect these views to be accompanied by unqualified support for the Petition. Remarkably, however, the government opposes certiorari.

In a case involving an important, purely legal issue upon which the circuits are divided, a negative recommendation from the government could only be justified by particularly weighty concerns of law or policy. But no such concerns are set forth in the government's Brief. Instead, this Court is urged to withhold consideration of this important, divisive, and recurring legal issue because one circuit "may find it appropriate to consider this issue en banc" (U.S. Br. 19, n.21), because a "consensus" may yet develop in the other circuits (U.S. Br. 19), and because a remand and trial may "shed light on the practical concerns that inform the question whether to recognize a federal common law right of contribution under ERISA" (U.S. Br. 20).

The makeweight character of these arguments strongly suggests that the real basis for the government's opposition to certiorari is the fear that a decision with which it agrees will be reversed by this Court. This is no reason to deny review; the government can and should be required to defend the judgment on the merits.

1. ***Conflict among the circuit courts.*** Begrudgingly, the government concedes the obvious: the majority decision below ("*Chemung*") conflicts with the Ninth Circuit's decisions in *Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989), and *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989).[1] The government argues, however, that this Court should ignore the issue until it has had a more "thorough examination" in the lower courts (U.S. Br. 19).

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[1] Indeed, legal periodicals have noted the split and have suggested the urgent need for the Court to resolve it. *See, e.g.*, "Chemung Canal Trust: Second Circuit Creates Conflict On Right of Contribution Among ERISA fiduciaries," *Tax Notes*, vol. 53, no. 10, p. 1169, 1172 (December 9, 1991) ("Hopefully, the petition for certiorari will be granted. The circuits are split and the contribution issue is fundamental to the fiduciary rules under ERISA."). *See also* "2d Circuit Recognizes a Right to Contribution Among Breaching Fiduciaries," ERISA Litigation Reporter, vol. 1, no. 4 (September-October, 1991) (noting that *Chemung* represents a minority view).

In fact, the conflict is far better developed than the government acknowledges. The Ninth Circuit is hardly the only jurisdiction in which ERISA defendants may not assert contribution claims. The Seventh Circuit in *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991), has ruled unambiguously that the courts have no authority to add new remedies to the ERISA scheme. The district courts in *Schloegel v. Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991), and *Hunt v. Magnell*, 766 F. Supp. 727 (D. Minn. 1990), have rejected a right of contribution, expressing confidence that the Fifth and Eighth Circuits, respectively, would do so. Other district courts in Alabama,[2] Illinois,[3] Maryland,[4] Minnesota,[5] New Jersey,[6] North Carolina,[7] South Carolina,[8] and Pennsylvania[9] have all rejected an ERISA right of contribution.

Some of these decisions rejected contribution on the ground that the remedy could not be "implied" from the policies and text of ERISA. Others, including *Call*, go further and hold that a contribution right cannot be "fashioned" as a matter of federal common law. But the government improperly minimizes the conflict by focusing principally on *Call* and *Chemung*. While the stated rationale for rejecting or permitting contribution claims is

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[2] *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421 (M.D. Ala. 1990).

[3] *Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596 (N.D. Ill. 1989).

[4] *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 696 (D. Md. 1990).

[5] *Physicians HealthChoice, Inc. v. Trustees of Automotive Employee Benefit Trust*, 764 F. Supp. 1360 (D. Minn. 1991).

[6] *McClendon v. Continental Group, Inc.*, 7 E.B.C. 2403 (D.N.J. 1986).

[7] *Brock v. Gillikin*, 677 F. Supp. 398 (E.D.N.C. 1987).

[8] *Franklin v. Aetna Life Insurance co.*, 10 E.B.C. 1022 (D.S.C. 1988).

[9] *Collini v. Wean United, Inc.*, 101 F.R.D. 408 (W.D. Pa. 1983).

of theoretical interest to lawyers and judges, all that matters to ERISA litigants is the result. The conflict is between courts that recognize a right of contribution and those that do not. This conflict is real, and it is widespread.

In any event, all these decisions — not only those that address "federal common law" arguments as *Call* did,[10] but decisions that reject "implied right" arguments as well — are in conflict with *Chemung* on analytical grounds. Technically, of course, the argument for "implied" rights of contribution is distinct from the argument for "federal common law" rights of contribution. Nevertheless, the "implied right" decisions conflict with *Chemung* because they reject its rationale. The *Chemung* majority held that Congress has directed the courts "to fashion ... a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence." A-35 to A-36. The decisions rejecting "implied" rights of contribution, on the other hand, uniformly hold that, because ERISA sets up such a comprehensive and interdependent remedial scheme, Congress did not intend to authorize judicial creation of contribution rights. *E.g., Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596, 598-600 (N.D. Ill. 1989); *Physicians HealthChoice, Inc. v. Trustees of Automotive Employee Benefit Trust*, 764 F. Supp. 1360, 1362-64 (D. Minn. 1991). In short, the "implied right" decisions are irreconcilable with *Chemung* because they reject its premise.

This conflict was expressly recognized by the Ninth Circuit in *Call*. Relying on *Massachusetts Mutual Life Ins. Co. v. Russell*, the Ninth Circuit had already refused to recognize an "implied"

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[10] Besides *Call*, decisions that address and reject "federal common law" arguments include *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991), *Schloegel v. Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991), and *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 696 (D. Md. 1990).

right of contribution under ERISA on the ground that Congress did not intend to provide or allow such a remedy. *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989). Undeterred, the defendants and the government (as *amicus curiae*) argued in *Call* that Congress *did* so intend. This time, however, they couched the argument in terms of the courts' power to create "federal common law." The *Call* court found that these arguments based on legislative intent had already been considered and rejected in *Kim*. (The government's Brief in *Call* in the Appendix is reproduced in the Petitioner's Appendix; see A-53 to A-62.) Virtually identical arguments based on legislative intent appear in the Brief submitted by the Solicitor General at the Court's invitation in the present case. These arguments undermine the foundations of this Court's decision in *Russell*.

2. ***The serious consequences of delay in resolving the contribution issue.*** The government urges delay to allow time for more lower courts to opine on the contribution issue. But it offers no clue as to what might be gained by more judicial renderings on the subject. There is no dispute that the issue is purely one of law. There have been a plethora of decisions at both the circuit court and district court levels. The government's Brief shows that it has well-considered views on the issue and can articulate the considerations that inform its views. It is respectfully submitted that petitioners likewise can thoroughly and capably present the available legal arguments against an ERISA right of contribu-

tion. No purpose will be served by waiting for still more courts to choose one position or the other.[11]

The government suggests that the Ninth Circuit "may find it appropriate to consider this issue en banc if it arises again in that circuit" (U.S. Br. 19, n.21), now that its decision in *Call* conflicts with a Second Circuit decision. Presumably, the government intimates, the Ninth Circuit would be influenced by the analysis of the majority decision below (even though, as already noted, the Ninth Circuit has already concluded that Congress did not intend to authorize new ERISA remedies). But en banc review could have been requested when *Call* itself was decided; at the time, *Call* was in conflict with the Seventh Circuit's decision in *Free v. Briody*, 732 F.2d 1131 (7th Cir. 1984) (effectively overruled by *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991)). If the Ninth Circuit did not rehear *Call* in light of the then-existing split in authority, there is no point in waiting for the issue to arise in the Ninth Circuit again.

Nor is there any reason to expect that either the Ninth Circuit or any other court will be overwhelmed by the force of the reasoning in *Chemung*, with its several analytical flaws. As one commentator has noted:

> The key part of the *Chemung* decision, and its main area of vulnerability, was its conclusion that the four-factor test in *Cort v. Ash* [422 U.S. 66, 45 L. Ed. 2d 26 (1975)] regard-

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[11] Indeed, the Solicitor General's hope that more circuit courts will weigh in on the contribution issue may go unfulfilled as ERISA plaintiffs react to existing law. As ERISA lawyer David S. Preminger points out in a letter reproduced as an appendix to this Brief (App. 3a-4a), plaintiffs whose claims involve nationwide ERISA plans will, for the most part, be able to take advantage of the no-contribution rule in the Ninth Circuit. The ERISA bar is acutely conscious of the state of the law, and as Mr. Preminger suggests, the *Chemung* decision will encourage forum-shopping. As noted below, Mr. Preminger is painfully aware of the implications of *Chemung* because he is counsel for plaintiffs in a significant case in which a large settlement has been derailed as a consequence of *Chemung*.

> ing when private rights of action should be implied "is an inappropriate tool for analyzing" contribution under ERISA .... The *Chemung* court asserted that contribution is not really a "right of action" but is really a "procedural device" for sharing losses among potentially liable parties. While that formulation has a nice ring to it, the non-ERISA Supreme Court cases on contribution expressly analyze contribution in terms of the *Cort v. Ash* test, noting the primacy of its first factor.

ERISA Reporter, supra note 1, at 4.

> Viewed from the actual facts of the *Chemung* case, it's hard to agree with the 2nd Circuit that a right to contribution does not "really" create a new right of action .... [I]t's not exactly right to say that contribution creates no right of action, when that's what has occurred in *Chemung*, or to glide by *Russell* and the anti-contribution authority from the Supreme Court. If we had to guess, we'd say that *Chemung* will stay in the minority ....

Id. at 5.

In light of the tenuous nature of the reasons it cites for delay, it is inappropriate for the government to brush aside the serious consequences of delay. Thousands of dollars have already been spent by fiduciaries and ERISA plans to litigate the issue of whether contribution is available — resources that could be better employed for retirement benefits for ERISA participants. This drain on the resources of employee benefit plans can be expected to continue so long as the issue remains unresolved.

3. ***The immediate and future impact of Chemung on the expense and complexity of ERISA litigation.*** As Fairway pointed out in its Petition, "[t]he result of the determination below will be to make ERISA litigation more drawn-out, expensive, complicated, and uncertain for the very class of persons ERISA was intended to benefit." Pet. 18. The lower court itself acknowledged the possibility "that injecting contribution claims into an

already complex area of litigation will only further complicate matters and build costs." Pet. App. A-36.

In its Brief, however, the government maintains that a contribution rule may actually "assist plaintiffs in proving their case" and may actually facilitate settlements![12] U.S. Br. 11-12. In the short time since the decision in *Chemung,* experience has already shown that this is not so. Driven by *Chemung*, the Second Circuit has now ruled that the availability of contribution precludes district courts from approving the settlement of Department of Labor enforcement actions for fiduciary breaches unless there has been an evidentiary hearing in which all parties with claims have an opportunity to participate. *In re Masters Mates & Pilots Pension Plan & IRAP Litigation*, 957 F.2d 1020 (2d Cir. 1992). In these "mini-trials," district courts will be required to evaluate the relative fault of the defendants and to determine that the settlement adequately compensates non-settling parties for their lost rights of contribution. *Id.* at 1031-32.

The *Masters Mates & Pilots* decision frustrated a class action settlement that would have provided over $20 million to a pension plan for losses incurred as a result of risky investments by breaching fiduciaries. Prosecuted by the Department of Labor as well as by private plaintiffs, the case was settled "after years of complex and protracted litigation." *Id.* at 1023. Counsel for the private plaintiffs in that case — who support the Petition in the present case — notes:

> Absent the [contribution] claims raised by the defendants,

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[12] As if common sense alone does not reveal that this is not a serious proposition, the present case shows how contribution claims inhibit the possibility of settlement. After being sued, respondent Sovran Bank not only sued petitioner Fairway as the plan sponsor, but brought a counterclaim against Chemung Canal Trust Company, whose sole involvement with the plan assets came after all losses had been incurred and whose only crime, so far as Sovran was concerned, was in suing Sovran.

> the trial of the matter (absent a settlement) would have been long since concluded. The class of plaintiffs in [*Masters Mates & Pilots*], as with most ERISA actions, includes numerous elderly individuals as well as the beneficiaries of those who have already died. Expeditious litigation is a prime concern for retired participants and beneficiaries.

Letter, David S. Preminger, Esq. to Christopher Wright, Esq., April 7, 1992 (appended to this Brief, App. la to 4a).[13] Counsel properly attributes the undue protraction of his case directly to *Chemung* and the contribution issue. App. 3a.

Not only plaintiffs, but ERISA defendants as well, are already feeling the impact of *Chemung* and its offspring, the *Masters Mates & Pilots* decision. Counsel for one defendant reports that *Chemung* has frustrated an agreed settlement of his case "and has caused our client and his insurance carrier to remain subject to the uncertainties and expenses of further litigation." He predicts "a similar chilling effect on settlements" in other cases as well. App. 7a.

Counsel for another defendant in the same case correctly observes that *Chemung* and *Masters Mates & Pilots* have "spawned an entire new class of litigation regarding the effect of settlements upon outstanding cross-claims." App. 10a. The fact is that merely recognizing a right of contribution opens the door to a host of related questions. What is the rule when fiduciaries are not equally at fault? What is the proper allocation formula? When is it proper to find indemnification instead of contribution? What is the scope of the right of contribution? These thorny issues, all of which the government identified in its Brief, will now occupy the time and energies of the courts of the Second Circuit.

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[13] Indeed, no end is yet in sight for the *Masters Mates & Pilots* settlement. Although the Second Circuit ruled that a "fairness" hearing was required, it stated: "However, we decline to delineate either the requirements or all of the appropriate considerations for the hearing." 957 F.2d at 1032.

In its Brief, the government ignores the manner in which the Department of Labor's attempt to settle *Masters Mates & Pilots* was frustrated as a result of *Chemung*. Instead, the government cites two 50-year old law review articles whose authors felt that more liberal contribution rules might actually have a salutary effect on settlement of litigation. U.S. Br. 11 n.12. Writing when the modern Federal Rules were in their infancy, these commentators perforce had not witnessed the staggering increase in complex, protracted federal cases that has occurred in the last 50 years. *See, e.g., Ginett v. Computer Task Group, Inc.*, 1992 WL 83272, p. 9 (2d Cir. decided April 21, 1992).

No contemporary litigator would predict, with a straight face, that *Chemung* would facilitate either the prosecution of ERISA fiduciary claims or their settlement. Concerns about the increased complexity and expense of ERISA litigation, about additional burdens on the courts, and about impediments to settlement militate heavily in favor of immediate review by this Court.

4. ***The power of the courts to "fashion" ERISA rights and remedies as a matter of federal common law.*** This Court has never held that the courts may "fashion" federal common-law rights under ERISA, and the government does not argue otherwise.[14] Instead, the government offers this chain of reasoning: (a)

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[14] The government relies, instead, on this Court's general comments in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 92 (1989), concerning the need for the federal courts to develop ERISA common law. But the Court in *Firestone* was not called upon to "fashion" ERISA common law, and its decision contains none of the analysis of ERISA's remedial scheme that would have been a prerequisite (*see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981)) to a finding that the federal courts were free to do so. There is no doubt, of course, that the federal courts may properly resort to "federal common law" in *construing* ERISA. But the government's Brief all but ignores the critical differences between the "interpretation" and the "fashioning" aspects of federal common-law-making.

Clearly the courts are allowed to "fashion" federal common-law rules in the field of admiralty; (b) the LMRA has been said to be analogous to admiralty with respect to the need for judge-made rules of decision; (c) ERISA Section 502(a) has been said to be patterned after LMRA Section 301; (d) the courts are therefore authorized to "fashion" common-law rules under ERISA. U.S. Br. 14-16.

This simplistic syllogism is flawed because it ignores altogether the limitations this Court has recognized on the authority to fashion federal common law rules in the first place. The government itself concedes that federal courts "lack general authority to fashion rules of federal common law." U.S. Br. 12. Formerly, for example, federal courts were generally empowered to "fashion" rules of admiralty law — but that was so because *Congress had left to the courts* the responsibility for developing those rules. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 10 L. Ed. 2d 720, 724 (1963). This is no longer unqualifiedly so, however, because Congress has restricted judicial prerogatives by legislating extensively and specifically in admiralty law. *Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275, 287 (1990)[15] Similarly, the courts may fashion federal common law under the LMRA — but that is so because in certain cases Congress has created a right and left it to the courts to fashion the extent of the right or its remedy. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972 (1957). Similarly, it is "unmistakably clear" that Congress left it to the courts to fashion rules for *substantive* violations of sections 1 and 2 of the Sherman Act — but Congress has, on the other hand, provided *detailed, specific remedial provisions* that preclude any authority "to alter or supple-

[15] Moreover, "even in admiralty" this Court has declined to fashion new remedies if there is a possibility that they might interfere with a legislative program. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981).

ment the remedies enacted." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-45, 68 L. Ed. 2d 500, 510-12 (1981).

This Court has thus made it clear that the authority to "fashion" federal common law depends on the intent of Congress, and that its intent can best be divined by evaluating particular statutory schemes. The courts are not authorized to fashion federal common law in cases where Congress has laid out "a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981). Indeed, there is a presumption, in cases of "comprehensive legislative schemes," that Congress deliberately left out any rights or remedies that were omitted. *Id.; accord, Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 106 (1984); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645, 68 L. Ed. 2d 500, 512 (1981).

At its heart, therefore, the authority of the courts to fashion a right of contribution turns on whether ERISA constitutes a "comprehensive legislative scheme" containing specific, detailed remedies. The Brief of the government dances around this issue and fails to address it. This Court, however, has already described the remedial provisions of ERISA as an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 106 (1984). The government suggests no reason why, given ERISA's existing statutory remedial scheme, the presumption against unspecified rights should not be applied to preclude a "federal common law" right of contribution under ERISA.

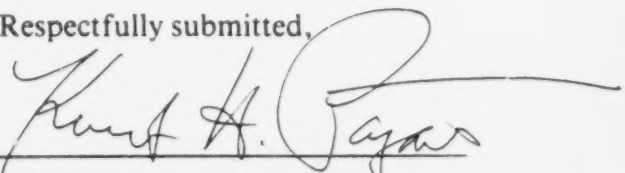
In any event, the issue is clearly ripe for review by this Court at this time; delay will not enhance the Court's ability to evaluate this legislative scheme to determine Congress's intent. Delay will lead to wasteful litigation and can only reduce the resources available to employees. Because the government has offered no compelling reason to justify this waste, the Court should decide the issue now.

Conclusion

For the reasons set forth above and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

June 1, 1992

Respectfully submitted,



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BY FEDERAL EXPRESS

April 7, 1992

Christopher Wright, Esq.
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Main Justice Building
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Washington, D.C. 20530

Re: *Fairway Spring Co., Inc., et al. v. Sovran Bank/Maryland*
Petition No. 96-680

Dear Mr. Wright:

We are writing in support of the petition for a writ of *certiorari* in the referenced matter. We believe it to be extremely important that the United States Supreme Court resolve the conflict in the circuits which has resulted from the Second Circuit's recent decision in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991).

We are liaison counsel for the class of private plaintiffs in *Cullen, et al. v. Lowen, et al.*, 87 Civ. 1798 (VLB), S.D.N.Y. ("Cullen"). *Cullen* is an ERISA action against the trustees of the International Organization of Masters, Mates and Pilots Pension

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Plan and Individual Retirement Account Plan (the "Plans") and a former investment manager of the Plans, Tower Asset Management, Inc. ("Tower"). In essence the private plaintiffs in *Cullen* (the Secretary of Labor subsequently filed a similar action which was consolidated with *Cullen*) allege that (i) Tower was unqualified to be an investment manager for an ERISA plan and should never have been hired, (ii) Tower engaged in illegal and imprudent investments which lost the Plans millions of dollars (*see* 829 F.2d 1209 (2d Cir. 1987)) and (iii) the trustees, *inter alia,* failed to monitor Tower thereby enabling the illegal and imprudent investments. It is estimated that losses exceed $50 million.

Cullen was commenced in April 1986. Discovery has included approximately 70 fact depositions occupying about 200 days, 1800 marked deposition exhibits, numerous sets of expert interrogatories as well as expert depositions and voluminous motion practice. In the spring of 1989, at the conclusion of fact discovery, the defendant trustees commenced actions for contribution and indemnity against the Plans' attorneys and auditors. While motions to dismiss such claims were made *inter alia* on the ground that ERISA precluded such claims, fact discovery was, of course, recommenced.

In June 1991, plaintiffs and most defendants entered into a settlement agreement. Because the settling defendants naturally insisted on finality, the settlement agreement included a "bar order" which barred the non-settling defendants' (including one trustee) claims against the settling defendants. Because the weight of authority at the time held that ERISA precluded claims for contribution and indemnity, the bar order seemed, for the most part, unassailable, at least until the *Chemung* decision.

The District Court upheld the settlement agreement, including its bar order provisions, as written, but the Second Circuit re-

versed certain aspects of the settlement. *Cullen, et al. v. Riley,* Nos. 91-6276, 91-6288 (2d Cir., February 21, 1992). (A copy of this decision is enclosed for your information.) While settling parties are currently in the process of revising the settlement agreement to comply with Second Circuit's decision, it is obvious that this litigation has become excessively protracted (i) because of the uncertainty of the viability of the claims for contribution and indemnification which required third party fact discovery to proceed while the motions to dismiss these claims were pending, (ii) because of the *Chemung* decision and (iii) because of the reversal of the bar order in light of *Chemung.*

We support the petition for *certiorari* in general because the doubt about the availability of claims for contribution and indemnity will continue to exist until the split in the circuits has been resolved. We also support the petition for the reasons expressed at pp. 15-18 thereof regarding greater expense and efforts for plaintiffs.

As already noted, *Cullen* has been in litigation for six years. Absent the claims raised by the defendants, the trial of that matter (absent a settlement) would have been long since concluded. The class of plaintiffs in *Cullen,* as with most ERISA actions, includes numerous elderly individuals as well as the beneficiaries of those who have already died. Expeditious litigation is a prime concern for retired participants and beneficiaries.

Another reason for granting the writ is ERISA's intent of fashioning a *uniform,* nationwide pension law. It is absurd to contemplate that the existence of claims for contribution and indemnity will depend on the circuit in which litigation is commenced. Especially with respect to nationwide plans, such as the Plans involved in *Cullen*, litigation could be commenced in any state. It is

merely happenstance that *Cullen* is pending in New York instead of California.

In order to eliminate the possibility of forum shopping and to remove the doubt which continues to pervade actions in which claims for contribution and indemnity have been or may be raised, we urge that you recommend that the Supreme Court grant the writ in the referenced matter.

Very truly yours,

s/ David S. Preminger
David S. Preminger

DSP:aes
Enc.

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March 19, 1992

BY EXPRESS MAIL

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Re: *Fairway Spring Co., Inc., et. al. v. Sovran Bank/Maryland*
Peition No. 91-680

Dear Mr. Wright:

We are writing in support of the petition for a writ of *certiorari* in the above-captioned matter. We are strongly in favor of the petition, as we feel it is imperative that the United States Supreme Court resolve the tremendous doubt and uncertainty stemming from the Second Circuit's recent decision in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2nd Cir. 1991).

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We are currently defending an action pending before the Honorable Michael B. Mukasey in the United States District Court, Southern District of New York, under case number CV 87-1046. The action was commenced by the Pension Benefit Guaranty Corporation ("PBGC") to recover damages for alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. section 1001, *et seq.*, in connection with the termination of a pension plan and an alleged unlawful removal of plan assets. Various individuals and entities have been sued by the PBGC, and a number of cross-claims have been asserted. Our client is an insurance broker who helped arrange for the purchase of an annuity contract in connection with the termination of the plan.

After almost four years of extensive discovery, involving numerous depositions, document productions, and motions, the PBGC agreed to a settlement of its claims against our client and one other defendant, conditioned, however, on the dismissal of all cross-claims. The PBGC's claims against the other defendants remain outstanding.

In light of the numerous cases in which the Courts have held that there is no right of contribution or indemnification under ERISA, we moved to dismiss all outstanding cross-claims. Based on these decisions, we anticipated that the Court would grant our motion and that we would therefore be able to proceed with the settlement.

Unfortunately, when our motion was conferenced before the Court, Judge Mukasey stated that he had been prepared to dismiss the cross-claims on the ground that there is no right of contribution or indemnification under ERISA, but that he had just received a copy of the Second Circuit's decision in *Chemung*. As you know, the Court in *Chemung*, for the first time in any juris-

diction, held that there is a right of contribution and indemnification under ERISA as a matter of federal common law. Judge Mukasey disagreed with the Second Circuit's decision on the record, but stated that he is bound to follow the higher court's determination.

As a result of the decision in *Chemung*, we have been unable to proceed with the settlement of the PBGC's claims against our client. We have also been compelled to engage in further motion practice, arguing that a "settlement bar" rule, such as that embodied in section 15-108 of New York's General Obligations Law, should be incorporated into ERISA as a matter of federal common law as well, should the decision in *Chemung* not be overturned. Needless to say, the *Chemung* decision has prevented us from consummating the agreed upon settlement with the PBGC, and has caused our client and his insurance carrier to remain subjected to the uncertainties and expenses of further litigation. Moreover, we have no doubt that the *Chemung* decision will have a similar chilling effect on settlements and give rise to substantial litigation in other cases as well.

The Second Circuit's decision in *Chemung* is contrary to the Ninth Circuit's decision in *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989), as well as the numerous other decisions in which ERISA's language and legislative history have been interpreted as providing remedies intended *solely* for the benefit of employee benefit plans (and their participants and beneficiaries) — not alleged wrongdoers. The *Chemung* decision is also inconsistent with the Supreme Court's repeated holdings concerning the circumstances under which federal common law should be fashioned. It should also be noted that the Second Circuit did not hear the *Chemung* appeal *en banc*, and that there was a dissenting opinion from Circuit Judge Altimari, one of the three judges who participated in the appeal.

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We, too, believe that the *Chemung* decision is incorrect. Quite simply, the doubt and uncertainty resulting from that decision has created an intolerable situation in our case, and will no doubt cause problems in numerous other cases as well.

For the foregoing reasons, we ask that you strongly recommend that the Supreme Court hear the appeal in the above-captioned matter.

Very truly yours,
MARTIN, CLEARWATER & BELL

Kenneth R. Larywon

KRL:DLK

APPENDIX

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370-8119

March 24, 1992

BY EXPRESS MAIL

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Re: Fairway Spring Co., Inc., et al. v. Sovran Bank/ Maryland
Petition No. 91-680

Dear Mr. Wright:

We are writing to urge your support of the petition for a writ of *certiorari* in the above-entitled matter. Like Kenneth R. Larywon, Esq. of Martin, Clearwater & Bell, who wrote a letter to you dated March 19, 1992, we believe it is extremely important for the United States Supreme Court to resolve the conflict that now exists among the Circuit Courts of Appeals as to whether cross-claims are permissible under ERISA, as a result of the decision by the Second Circuit Court of Appeals in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991).

We represent the other settling defendant in the case described by Mr. Larywon, and we support the petition for all of the reasons which are stated in his letter. Because those reasons have already been clearly expressed, we don't believe there is any reason to repeat them here. However, we believe that a recent decision by

the Second Circuit Court of Appeals, which was not yet known to the New York bar on the date of Mr. Larywon's letter, has provided one more reason to support this petition, and made it even more imperative for the Supreme Court to resolve the existing conflict.

In a case entitled *In re Masters, Mates and Pilots Pension Plan and IRAP Litigation,* Docket Nos. 91-6276, 91-6288 (2d Cir. Feb. 21, 1992), the Second Circuit held that a settlement by one or more defendants of claims asserted under ERISA cannot extinguish the contribution or indemnity rights of third parties, at least where such rights have been asserted by cross-claim in the same action, unless and until an "evidentiary fairness hearing" is conducted and the District Court's approval is given. The court further indicated that approval could be given only after due consideration of a variety of pertinent factors, but it declined to specify what factors had to be considered. (A copy of the said decision is enclosed herewith.)

Thus, the Second Circuit's decision in the *Chemung* case has, predictably, spawned an entire new class of litigation regarding the effect of settlements upon outstanding cross-claims. Furthermore, the "fairness hearings" which have now been mandated by the *Masters, Mates and Pilots* decision will (a) impose a new burden upon the district courts, whose calendars are already heavily congested; (b) force parties to undergo additional expense and uncertainty of litigation, even after a putative settlement is reached; and (c) necessarily have a chilling effect on the settlement of ERISA claims, which would otherwise benefit pension plan participants.

Most importantly, for the purposes of the petition that you are now considering, all of these adverse effects may be entirely unnecessary. If the Supreme Court were to reject the reasoning of the

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Second Circuit in *Chemung* in favor of that employed by the Ninth Circuit Court of Appeals in *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989) and *Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989), and hold that there is no right to assert cross-claims under ERISA, the need for collateral litigation and "fairness hearings" would disappear, with all of their attendant uncertainty, expense and delay.

Accordingly, for the reasons set forth above as well as those that are contained in Mr. Larywon's letter to you dated March 19, 1992, we respectfully suggest that you recommend issuance of a writ of *certiorari* in the above-noted proceeding.

Very truly yours,

s/ CSR
Christopher S. Rooney

CSR/jml
Enclosure

cc: Kenneth R. Larywon, Esq. (By telecopier)